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Staff Report of the Joint Committee on Tort Liability to the Governor and Legislature

Joint Committee on Tort Liability

California Legislature

Joint Committee on Tort Liability

ASSEMBLYMAN JOHN T. KNOX
CHAIRMAN

SERIES 1978 STAFF REPORT

OF THE

JOINT COMMITTEE ON TORT LIABILITY

TO

THE GOVERNOR AND LEGISLATURE

JANUARY 1979

JOINT COMMITTEE ON TORT LIABILITY

SERIES 1978 STAFF REPORT

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California Legislature

Joint Committee on Tort Liability

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CHAIRMAN

January 2, 1979

Hon. Edmund G. Brown, Jr., and
Members of the Legislature
State Capitol
Sacramento, CA 95814

Dear Governor and Members:

Joint Committee on Tort Liability
Series 1978 Staff Report

Attached is the Joint Committee on Tort Liability Staff Report for 1978. After several committee meetings, it became apparent that we would be unable to achieve a committee consensus on a variety of issues. For that reason, I am submitting the staff report as such and not as the report of a majority. Each member of the Committee has the opportunity to author or sponsor those legislative recommendations which are soon to be drafted in bill form.

I have requested that our citizen advisory committees to continue and provide critical comment on proposed legislation. In addition, the advisory committees will be submitting their own reports and recommendations in early 1979. The staff reports are not the reports of the advisory committees, and the members of the advisory committees are unable to establish majorities for approval of each of the staff recommendations. The separate advisory committee reports will probably reflect the majority opinions of each such committee.

This Committee was established by the Legislature in response to an alleged tort system "crisis." Problems were manifested in the form of ever increasing liability insurance premiums. In response to questions about such premium increases, insurers blamed the uncertainty of a tort litigation system which allows non-meritorious suits and outrageous verdicts or awards. The recom-

mended solution was to bring certainty to the law so that liability exposure could be better anticipated. Premium rates could then be a more accurate reflection of this anticipated exposure.

Although we have found deficiencies in the litigation system which, if remedied, will result in a reduction in transaction costs, such deficiencies alone do not justify the alleged significant increases in liability premiums. We believe that further examination of the litigation system and the liability insurance process is warranted.

At times the work of the staff was unrewarding. Correspondents to the Committee made allegations concerning various problems. When asked for substantiation, however, much of the supporting material was apocryphal. Many state appellate and Supreme Court decisions receiving notoriety were based upon pleadings (e.g., sustaining of a demurrer or granting of summary judgment) with the factual issues not yet tried. Many critics of the legal system base their disapproval upon these decisions and apocryphal materials.

Other times, the staff received factual materials, encouragement and thoughtful comment from interested persons, including judges, lawyers, physicians, manufacturers and consumers. Some of these persons assisted by providing practical analyses of staff proposals.

The final supervision of this Report and the ongoing work of the Committee were done by William C. George, Esq., Counsel to the Committee. He brought to the work broad experience as a deputy county counsel and an inquiring mind. This report is in large part due to his tenacity and energy.

I would like to thank all of the staff who have thus far participated in this study. They are:

Harriet Bearman
Elizabeth Bleile
Mitchell Coffey
Cathy Craft
Joyce A. Faber
Prof. John Fleming
Darlene E. Fridley
William C. George
Martha C. Gorman
Fred J. Hiestand
Denise Jarman
Joan Manee
Gayle L. Phillips
Brian Regan
Estelle Schleicher
Prof. Gary Schwartz
Charles Spann

Because of their extra effort, I wish to especially thank the following persons who contributed their skills as this project progressed: secretaries Joyce Faber and Darlene Fridley who under pressure of getting out the 1978 report gave up weekends and holidays, and Denise Jarman and Gayle Phillips, staff interns who provided imagination and interest in approaching their tasks.

Ms. Jarman, a legal purist, furnished critical perspective to staff proposals. I would also like to thank Justice Robert S. Thompson of the Second District Court of Appeal and Professor Gary Schwartz, who gave of their time beyond official committee duties by offering thoughtful suggestions and criticisms.

The following is the 1978 Staff Report of the Joint Committee on Tort Liability.

Very truly yours,

JOHN T. KNOX, Chairman
Joint Committee on Tort Liability

JTK:df

Attachment

California Legislature

Joint Committee on Tort Liability

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ASSEMBLYMAN JOHN T. KNOX
CHAIRMAN

January 2, 1979

Hon. John T. Knox, Chairman
Joint Committee on Tort Liability
Room 2148, State Capitol
Sacramento, CA 95814

Dear Chairman Knox:

Attached is the 1978 Staff Report of the Joint Committee on Tort Liability. The Report consists of sections concerning liability for automobile, government, medical malpractice, procedure, products and restaurant and bar owners. We have attempted to ascertain what should be the reasonable expectations of litigants and based our recommendations thereon. Ideally, liability should follow responsibility (Li v. Yellow Cab Co., [1975] 13 Cal. 3d 804). We believe in the concept of comparative fault and think that logically it should be extended.

The sections of the Report need no amplification, but comments upon some special areas are warranted. In government liability, the Legislature should consider the application of the Li v. Yellow Cab Co., supra., principles to inverse condemnation. Although this is not specifically a tort area, it is related. There appears to be manifest injustice to public entities as a result of holdings such as: Albers v. County of Los Angeles, (1965) 62 C.2d 250, Sheffet v. County of Los Angeles, (1970) 3 Cal. App. 3d 720, and Blau v. City of Los Angeles, (1973) 32 Cal. App. 3d 77. In each of these cases, there were two parties whose conduct gave rise to the damage, but only the public entity shouldered the loss. It would seem appropriate that the Li concept of liability following responsibility be extended to inverse condemnation.

Proposition 13 may compound an already poor situation for public entities by decreasing maintenance and increasing potential liability. This should be watched.

Assuming any proposed legislation is not unconstitutional, the Legislature should clearly manifest its intent to the judiciary by appropriate comment accompanying statutes. It appears that the principle of separation of powers itself has been eroded by recent decisions, especially those which have limited or abolished statutory immunities. Some of these changes have a direct financial impact on public entities.

We have referred to our Report as Series 1978 because further work must be done in the insurance and professional liability areas. Also, there will be additions to product liability and procedure. These new materials will be Series 1979.

When our recommendations have been reduced to bill form, we intend to present them to our advisory committees for review and comment. When the recommendations are in final bill form, they will be available for introduction.

Very truly yours,

WILLIAM C. GEORGE, Counsel
Joint Committee on Tort Liability

WCG:df

Attachment

AUTOMOBILE LIABILITY

AUTOMOBILE LIABILITY

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INTRODUCTION

The automobile liability report is the product of a review of written materials relevant to automobile tort liability problems and the economic impact of automobile related accidents; information gathered at Automobile Liability Advisory Committee meetings; review of the transcripts of public hearings relative to automobile liability problems; proposed legislation and adopted legislation; decisions of the California courts of appeal and the California Supreme Court and some other state review court decision; and visits to other public agencies, including visits to other states and meetings with other state insurance department personnel and persons interested in automobile liability problems. From the collected information, automobile liability issues were identified and examined within the law. Proposed solutions of the problems were formulated and when possible discussed with persons who were knowledgeable in the law and/or aware of the practical problems which may be introduced by any proposed solution. After the discussions of the proposed solutions, recommendations were formulated based upon the assumed issues and the most practical solutions.

Like other study areas undertaken by the Joint Committee on Tort Liability, the Automobile Liability area was identified as a problem area because of public and consumer allegations that the costs of automobile insurance had become excessive. Insurers' reasons for the increase in insurance costs related, in major part, to the tort liability system. It is alleged that the

system is uncertain and has produced increasing claims activity both in number of claims and the amount of the claims. Therefore, our study had to examine both the tort liability system which produced claim results and, in turn, increased insurance costs, and the insurance system itself since there may be reasons for the increases in costs other than tort system problems.

Following is a discussion of the problems, the facts surrounding or related to the automobile liability system, some of the issues to be resolved, and some proposed resolutions of the issues.

I

THE PROBLEMS

Automobile insurance premiums have been increasing apparently faster than either the general inflation rate and income. As a consequence of this increase in rate, some persons allege that they are unable to purchase insurance and therefore are going without it.

According to a Wall Street Journal article (5/19/77, p.1,19) some drivers in Florida's Dade County allege that the automobile insurance premiums almost equal the value of their vehicles. For example, a 24 year old female driver having a clean driving record driving a 1966 Ford Mustang ($1200 value) was being charged an annual premium of $1100.00. Other examples of high rates include, a $1,320.00 minimum coverage premium for an under 25 year old male driver.

Although Florida has a compulsory insurance requirement, high insurance prices are causing numerous motorists to go without insurance with the result that almost 30% of the drivers are without automobile insurance (Wall Street Journal, supra.). The high cost has precipitated other forms of conduct such as using counterfeit documents as proof of insurance in order to register a vehicle. In addition, some motorists request automobile body shops to pad repair bills to recoup some of the premium costs.

Other motorists insure and register their automobile in other states to take advantage of lower premiums. However, the most significant effect of the high cost of automobile insurance is the increase in the number of uninsured motorists. Under the tort liability system, this creates a problem for those who may be injured by an uninsured driver (Wall Street Journal, supra.).

The problem of high insurance costs raises other issues in light of numerous articles in magazines and papers describing the profits of insurance companies for the last two years. A person finding it extremely difficult to pay for insurance for his automoiile is even more perplexed when told that in view of recent insurance company profits the premiums for such insurance are not necessary for the probable risk.

According to the November 1978 issue of Nation's Business, $150 billion in premiums were paid to insurance companies. Allegedly the insurance companies paid close to $2 billion in premium taxes to the 50 states. Here we are only speaking of

premiums. In addition to receipt of the premiums, property/casualty companies owned $62.5 billion in bonds and $26.8 billion in common and preferred stocks. However, the companies only focus on premiums and what is referred to as underwriting losses.[1]

Insurers allege that their problems arise primarily from the costs of repairs to automobiles and the rising cost of medical coverage. However, besides inflation, insurers say their costs are affected by fraudulent claims.

> "General Insurance Company of Florida believes that 70% of all bodily injury claims against the company are fraudulent . . . Allstate's Mr. Pike says that last year (1976) the average cost of bodily injury claims on the company in Miami was $5,931.00 compared with only $1,791.00 in Atlanta" (Wall Street Journal, supra.).

Included in the severity of the claims according to insurers, are numerous very high verdicts, the major portion of which includes damages paid for pain and suffering. Among the factors contributing to the increase in medical payments is the design of automobiles. Because of the demand for increased fuel conservation, automobiles have become smaller and lighter. Collisions between smaller and lighter cars with heavier cars inevitably produce more serious injuries in the lighter cars. In addition, collisions between lighter cars still result in more injuries than would be the case if two heavier cars collided. This is due, in part, to the more confined area of a smaller car. As a result of such confined area, there is a more rapid deceleration of the auto occupant's body between primary and secondary impacts. Also, it is almost a factor subject to judicial notice that the sheet metal used in

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[1]Cosgrove, "Insurance--A Premium Place In American Economy," Nations' Business, Nov. 1978, p. 105.

the smaller and lighter cars is thinner than that found in the larger, heavier cars. Not only does this contribute to occupant injury, but it also raises property damage or collision costs.

Property damage is an area which must be handled apart from bodily injury. The same rules are not applicable in both cases. Both Michigan and Massachusetts had significant problems with property damage coverages. This area will be discussed throughout the report.

In addition to problems involving the vehicle and roadway, consumers question the methods used by insurance companies for rating and for determining whether or not to sell insurance. According to the Los Angeles Daily Journal, 8/15/78 (p.1, Col. 1, p.2, Col. 6), Los Angeles Supervisor Kenneth Hahn alleged that the state Insurance Commissioner, Wesley Kinder, had failed to act upon charges that insurance companies were discriminating against metropolitan area motorists. The suit to which Supervisor Hahn was referring is a suit by the County and City of Los Angeles against two major automobile insurers to compel the Insurance Commissioner to hold public hearings on rating practices of such companies.

In addition to territorial discrimination, there are allegations that age and sex considerations are not relevant to rates. In June of 1978, the Committee of National Association of Insurance Commissioners approved a report asking insurance companies to stop taking age and sex into consideration and that the rating be based on loss data (National Assoc. of Ins. Commissioners, Automobile Insurance D-3, Subcommittee Rates and Rating Procedures Task Force Report, 9/8/78).

A related problem is the method of assigning drivers to the California Assigned Risk Plan. If, in the event changes are implemented in these conventional rating system, it is possible that drivers may be placed in the Assigned Risk Plan. The Assigned Risk Plan can charge higher premiums for the insurance on the assumption that motorists in the Plan cannot obtain conventional insurance because of their poor driving records. Consideration will be given in our insurance recommendations for a reinsurance program substitute for Assigned Risk Plans.

Cost is not the only problem with the automobile liability system. There are numerous difficulties with its administration. Originally automobile liability insurance provided protection for the assets of the automobile owner in the event such owner might be found liable for damages to another. However, as time passed it became apparent that insurance was necessary to protect the victim. This need became obvious with the advent of the irresponsible motorist. This area of legislation emphasizes this concept of assuring victim protection by 1) the financial responsibility law (Vehicle Code Sections 16000 and following) and 2) uninsured motorist coverage (Insurance Code Sections 11580.2 and following). Each of these provisions assumes the method of compensation, if any, of the insured party will be pursuant to the tort liability system.

Under the tort system, assuming a limited number of product liability cases and a very limited number of defective street cases, a large number of the persons involved in these injury accidents

will go without compensation, except to the extent they have first party coverage. Other persons involved in multiple vehicle accidents will probably share some responsibility for their injuries. Under the Comparative Fault doctrine their potential recovery will be diminished. The presence of the uninsured motorist, which is approximately 14-25 percent of the drivers in California, further diminishes the potential recovery in many accidents.

From the foregoing, we estimate a substantial number of persons injured in automobile accidents will be required to look to a source of compensation other than an at-fault driver. Even accidents involving two insured drivers will result in a limitation of recovery for those persons involved in catastrophic accidents. The catastrophic accident for our purposes is one involving economic loss of $25,000 or more. The required coverages for public liability and property damage in California are $15,000, $30,000 and $5,000 and in any accident involving catastrophic injuries, the potentially liable driver will seldom have insurance in excess of the required minimum limits. He will also, in all probability, be judgment proof for any amount in excess of the minimum levels. Before the injured party may hope to recoup any of his economic loss, he will have to satisfy the condition precedent under the fault system to establish liability on the part of the other driver. Only then can he be compensated from such other driver's liability insurance funds. Between the time of the accident and the compensation therefor, the injured person

will have to bear the costs of his medical needs, any lost wages and probably his property damage.

> "In Anglo-American jurisdictions, the law of the automobile claims systems is a segment of tort law - a body of law concerned with private redress for accidental and intentional injuries. The primary question of automobile law is the primary question of tort law generally: why provide an award of money to the victim rather than allow a loss to remain where it has fallen?
>
> It is often stated that the principal objective of tort law, and of any automobile claims system; is to compensate for loss. More precisely, however, the objective is to determine whether to compensate, and if so, how. Tort law prescribes the negative of compensation - the circumstances under which compensation will not be awarded - as well as the affirmative. Underlying the whole body of tort law is an awareness that the need for compensation, alone, is not a sufficient basis for an award. When a plaintiff receives a defendant's payment in satisfaction of a judgment obtained in court, loss is not compensated in the sense that it is somehow made to disappear. It is only shifted: to the extent that the plaintiff gains, the defendant loses. Moreover, the machinery for adjudicating whether and how loss is to be shifted is provided at considerable economic cost to the community and to the parties. To the costs of courts to society and the costs of lawyers to the parties must be added others less tangible and direct; for example, the costs of missing work to testify in court, the discomfiture and even agony of recreating the accident at the trial, and the anger and frustration of a courtroom fight. When loss is shifted by way of an award, these costs of adjudication, tangible and intangible, produce a net loss from an overall point of view unless advantages outweighing them are realized.
>
> From a recognition of this truth emerges a basic principle underlying both tort law generally and that segment of tort law concerned with automobile cases: an award is not to be made unless there exists some reason other than the mere need of the victim for compensation. Otherwise, the award will be an arbitrary shifting of loss from one person to another at a net loss to society due to the economic and sociological costs of adjudication." (Keeton and O'Connell, "Basic Protection--A Proposal For Improving Automobile Claims Systems," (1964) 78 Harv.L.Rev. 329, 330-331).

An examination of some basic facts will indicate the scope of the problem especially in California. The number of vehicles and drivers and the amount of roadway and the amount of motorist activity demonstrate the need for an adequate and fair automobile injury compensation system.

II

FACTS

A. Data. In 1977, according to information from the California Highway Patrol, the Department of Motor Vehicles and data contained in the Statistical Abstract - State of California, the following conditions obtained:

1. Licensed drivers: 14,599,000

2. Registered vehicles: 15,447,979

3. Miles of road:

City	- 48,758
Unincorporated state highway	- 12,718
County roads	- 71,857
Total	133,333

4. Miles driven: 153,596,262,400

5. Population: 21,896,000

B. Accidents:

1. Property Damage Accidents: 318,115
(Not all agencies in state report property damage only accidents)

2. Injury Accidents: 193,270

3. Fatal Accidents: 4,443

4. Number of Persons Injured: 284,079

5. Persons Killed: 4,942

C. The young driver and the drinking driver:

Six thousand four hundred fifty seven (6,457) drivers were involved in the 4,443 fatal accidents. Of these 6,457 drivers, 2,183 had been drinking and 1,535 of those had been under the influence of alcohol or drugs. Two thousand five hundred seventy five (2,575) of the 6,457 drivers were between the ages of 15 and 24 years. Of these 2,575 drivers, 1,002 had been drinking. In fact, of all the drivers in fatal accidents 2,183 or 33.8% had been drinking. Of the total number of licensed drivers in the state (14,599,000), 21.6% or 3,151,200 (i.e. ages 15-24) were involved in 39.9% of the fatal accidents, and 37.5% of the injury accidents. Drivers between the ages of 25-29 years 2,007,200 or 13.7% of the total, licensed drivers accounted for 14.6% of the fatal accidents and 14.6% of the injury accidents. Drivers between the ages of 15-19 years constituted 7.7% of the total numbers of drivers, but caused 17.6% of the fatal accidents. All other drivers, i.e. 30-65 and over, caused fewer fatal and injury accidents than their proportion to the total driving population.

D. Place of accident:

Of the 4,942 persons killed, 2,396, or 48.5%, were killed on city roadways and 2,546 or 51.5% were killed on unincorporated roadways. However, in the injury category, 205,648 or 72.4% were injured on city roadways, and 78,431 or 27.6% were injured on unincorporated roadways.

E. Collision factors:

In 1977 the primary collision factor in 31.4% or 1,394

of the fatal accidents was driving under the influence of alcohol or alcohol and drugs and in 12.4% or 550 of the total, (4,443) the primary factor was excessive speed. Therefore, 43.8% of the fatal accidents involved driving under the influence of alcohol or alcohol and drugs or excessive speed.

From the foregoing it is apparent that drivers between the ages of 15-24 account for a disproportionate number of fatal and injury accidents and a significant number of drivers who are involved in injury or fatal accidents have been drinking or have been engaged in excessive speed.

F. Type of accident:

In 1974, 40.8% of the fatal accidents and 33.8% of injury accidents involved only a single vehicle. In 1975 it was 57.3% for fatal and 33.3% for injury; 1976, the totals were 56.3% and 32.7%; and 1977, 57.2% and 33.0%. Absent any potential product action or suit against a public entity there is little likelihood of any recovery for many injured persons.

G. Probability of accident:

Based upon the statistics from 1977, we can estimate that approximately 2.2% of California drivers will be involved in a property damage accident, 1.3% will be involved in an injury accident, and .03% will be involved in a fatal accident.

From the facts it is apparent that one-third of all the injury accidents and about one-half of all fatal accidents will involve a single vehicle.

Although the probability seems high it is estimated that on a national basis approximately 25% of drivers will be involved in a property damage accident. A consequence of these accidents will be significant repair costs.

According to Jack Scagnetti, Auto Insurance Part IV, Motor Trend, (Mar. 1978, p. 92), hospital service charges for a semi-private room soared 268.6% from 1967 to 1976 and physicians' fees 188.5% for the same period. The economic loss for auto accidents in 1976 was $40.89 billion.

H. Visits to other agencies:

In October 1978 some members and staff of the Joint Committee on Tort Liability travelled to Michigan, Massachusetts, New York, New Jersey and Indiana. They met with insurance commissioners and representatives of the trial Bar of those states and spoke to persons who were familiar with the formulation of and administration of no-fault laws in various states. Commissioners from Florida, Kentucky, Massachusetts, Michigan, New Jersey, New York, Pennsylvania and Indiana were contacted. All of those states, except Indiana, have some form of traditional no-fault automobile insurance.

The approach was to meet with the commissioner or other insurance department representative of a no-fault state, discuss the law and the problems connected with administration of the law, ask for factual information to determine how well the plan accomplished the objectives of the legislation and ask for any samples

of proposed legislation which was to overcome some of the deficiencies of the plan. After talking to the commissioners or other insurance department staff, meetings were held with representatives of opponents of no-fault automobile insurance. In most instances the opponents of no-fault insurance were members of the trial lawyers' association of the particular state. In addition, Committee people met with other persons knowledgeable about the operation of no-fault plans but not connected either with the state insurance department or with the trial lawyers' association. In some states information was factually more complete than in others but in most states the Committee was able to obtain a fairly realistic picture of the successes and problems with the no-fault operation. After meeting with commissioners and other representatives of the individual states, Committee representatives met with a group of insurance commissioners in Indianapolis, Indiana. At that time no-fault automobile insurance issues and other automobile insurance problems such as how to decrease the number of uninsured motorists within the state were reviewed.

Although the primary objective in the trip was to discuss automobile no-fault, there were meetings with insurance commissioners to discuss problems of state regulation of insurers.

The following is a brief summary of some of the findings:

MICHIGAN

A meeting with Commissioner Thomas Jones, a deputy commissioner and an assistant commissioner reviewed the performance of no-fault

automobile insurance in Michigan. Commissioner Jones said that in general the no-fault automobile insurance program in Michigan was meeting most of its goals. The significant areas of difficulty were property damage and motorcycle coverage.

Commissioner Jones acknowledged that most of the people in the state when asked whether or not they liked the no-fault system responded negatively. However, when the method of inquiry was broken down in terms of catastrophic accidents and minor accidents, it appeared that the greatest dissatisfaction was directed toward the property damage aspects of the Michigan program. Those persons involved in catastrophic accidents fared much better under the no-fault system than under the previous tort system.

According to the Commissioner, consumers in general disliked the insurance system. Of great concern to consumers were the cost of automobile insurance and unfair rating practices employed to determine premiums. Commissioner Jones indicated that the actual economic losses paid to injured parties are, as he had previously reported, approximately 65% higher with no-fault than the tort system. In addition, the claims are being satisfied very quickly. Michigan has a 12% penalty for those claims not satisfied within the statutory period. From the evidence obtained by the Michigan Bureau, Commissioner Jones concluded that his department was not receiving very many complaints about companies failing to make timely payments.

Commissioner Jones felt that rates under no-fault did not increase as rapidly as rates under fault systems. From statistical

information gathered by the Commissioner, it appears that the percentage of increase of Michigan rates was less than the percentage of increase of rates in other states operating under the tort system. A factor which influences rate increase or reduction is the amount of money set aside in reserve. Some Michigan companies may still be reserving for liability cases to guard against the possibility of the no-fault statute being declared unconstitutional. These reserves will influence the cost of insurance.

The Michigan Department of Insurance acknowledged that there were problems with the motorcycle coverage. Some court decisions have allowed the motorcyclist to be treated as a pedestrian under no-fault law. This is contrary to the intent of the legislature in orginally adopting no-fault insurance. Motorcyclists have a disproportionate number of the catastrophic accidents in ratio to the total number of motorcycles to automobiles in the state. In addition, when injuries occur in a motorcycle accident, the injuries, on an average, are more severe than in automobile accidents. Because of this exposure the legislature felt that it was better to retain motorcyclists in the liability system. Michigan is going to do more study on the motorcycle coverage problem.

Commissioner Jones and his department agree that the most difficult issue under the no-fault system is the handling of property damage. Assuming the ratio of non-injury accidents to

injury accidents is the same for Michigan as it is for California, approximately 61.7% of the total number of accidents are property damage accidents, 37.4% are injury accidents and 0.9% are fatal accidents. More people have contact with the automobile insurance system as a result of property damage accidents than injury or fatal accidents. Because there is no liability system for property damage under the Michigan no-fault law, each person must insure his or her own car. Due to a lack of understanding on the part of most Michigan motorists, this aspect of the no-fault law has resulted in the greatest number of complaints. The Commissioner's office recommends retention of the present system, but also recommends greater effort to provide educational materials to the public so that it understands the principles of the system. One of the reasons for not changing the property damage aspect of the no-fault law is the contention that the insurance industry would incur substantial cost in going back to the old system. This would involve new forms, the retraining of personnel and so forth. This is a factor that need not affect any California decision in that staff could recommend a no-fault system for bodily injury but retain the fault system for property damage liability.

Another area of criticism of the Michigan system is the unlimited medical and rehabilitation benefits. However, the Commissioner pointed out statistically that this is not a viable claim. Because of the very low number of catastrophic accidents (those that are $25,000 and more) to the total population, the impact upon premiums is negligible.

Another recommendation of the Commissioner is that insurers be required to justify rate differentials. In addition, he suggested that there not be a requirement of prior approval of rates since he felt that that influenced the rate-setting by hedging.

For catastrophic claims in excess of $250,000 the Commissioner is recommending an association of insurers which will spread the losses above $250,000 among the member companies. Membership of the association would be mandatory as a condition precedent of writing automobile insurance in Michigan.

Mr. George T. Sinas, representative of the Michigan Trial Lawyers Association stated that there was difficulty in interpreting the present Michigan law. In addition, there were issues concerning the use of collateral benefits and challenges to the constitutionality of the statute because of disparity of treatment between governmental benefits and other benefits.

According to Mr. Sinas there are too many delays in receipt of first party benefits. If there is a dispute between insurer and claimant, such dispute must be ultimately resolved in a trial court. These suits, according to Mr. Sinas, are calendared with other suits, therefore move too slowly. He felt that the sanction against companies, i.e. 12% interest on the claim amount, is not realistic since most insurers can equal or better that by retaining the money.

Mr. Sinas says that loss of consortium should be another item included as compensable under the statute. In discussions with Mr. Sinas, however, it was clear that he was referring to

loss of consortium for sub-threshold accidents because the accidents which meet the threshold allow resort to the tort system for non-economic losses. Mr. Sinas also felt that there should be a clarification of the relationship between worker's compensation benefits and no-fault benefits. Mr. Sinas was also critical of the property damage exclusion and said that it discriminated against the poor.

Mr. Sinas suggested that there were other problems involving motorcyclists' coverage and uninsured motorists who have immunity from non-economic losses below the threshold. There is a conflict of decisions in these areas. He felt that there should be some provision in the Michigan law for better enforcement of sanctions against uninsured motorists. Bob Rowe and Tom Downs, the two persons most intimately connected with the establishment of the Michigan no-fault plan provided some historical and factual data relating to the Michigan no-fault plan. Both Mr. Rowe and Mr. Downs were supportive of the plan and believed that it has accomplished its objectives of:

1. More timely payment for injuries from the time of claim.
2. A greater portion of the premium dollar paid for economic loss than under the tort system.
3. More benefits payable to the injured party.

MASSACHUSETTS

Andrew F. Giffin, First Deputy Commissioner, of the Division of Insurance and Commissioner James Stone met with Committee representatives in Massachusetts. In addition, Committee personnel

met with John G. Ryan, former insurance commissioner and Eugene G. Coombs, Jr., a partner of Mr. Ryan in the firm of DiMento and Sullivan. Lastly, there was a meeting with Paul Sugarman, a trial lawyer representative. Mr. Ryan, Mr. Coombs, and Mr. Sugarman are all very familiar with the Massachusetts no-fault law.

The Massachusetts plan, a very moderate plan compared to Michigan, is one of the first in the United States. It has a $500 threshold with a verbal alternative for fracture, dismemberment, disfigurement, loss of sight, hearing or death. In addition to the no-fault coverage, Massachusetts has a compulsory liability coverage of $5,000/$10,000/$5,000. The maximum benefit in no-fault is $2,000 which is to include medical costs, wage loss, replacement services and funeral costs. There are no survivor benefits. Even very moderate no-fault provisions have resulted in a reduction in litigation. Motor vehicle tort filings have declined from 1970 through 1975 in both Massachusetts Superior Courts and Massachusetts District Courts. The jurisdictional limit of the district court was $2,000 or less prior to 1974 and $4,000 or less thereafter.

Mr. Ryan was neither enthusiastic nor critical of the no-fault plan in Massachusetts. Mr. Coombs was generally supportive of it. Mr. Sugarman indicated that the plan was meant to carve out a certain number of claims at the bottom of the dollar amount and to that extent it has been successful. According to Mr. Sugarman, the cases which have been taken from the courts should not have been in court since they are more of an irritant and more

expensive in the time involved than the results warrant. According to Mr. Sugarman, Mr. Keeton (of Keeton and O'Connell fame) is correct in his view of the system, but incorrect in the proposed solution. Mr. Sugarman states that before you speak of solutions you have to determine what is the question. The question can involve: a) cost of insurance, whether or not real, b) court congestion to the extent impacted by automobile liability cases, c) time between injury and compensation, d) the portion of the insurance dollar going to the injured party (according to Mr. Sugarman more money goes to agents and brokers than the injured parties), and e) several and joint liability.

Mr. Sugarman believes that if you cut out of the system a certain number of claims, the premiums should go down. He was unable to answer the court congestion allegations since data indicate there are fewer motor vehicle filings. However, the courts are still congestsd. As far as the time between injury and compensation, it is still relatively long.

In conclusion, it appears that the Massachusetts modified system has taken a certain number of the claims out of the system.

Massachusetts is the source of more significant general insurance information than automobile insurance information. Staff has compiled much material from the office of the commissioner. The findings from this material will be included in our insurance report.

NEW YORK

In New York Committee representatives met with Dick Stewart, the insurance commissioner at the time of the formulation and adoption of New York no-fault plan. In addition to Mr. Stewart, there was a meeting with Sheridan Albert, Esq., a member of the New York Trial Lawyers Association. Mr. Stewart was extremely knowledgeable of the philosophy behind no-fault and the New York no-fault plan. Prior to the most recent changes, the New York plan provided for a $500 threshold for injuries resulting in death, dismemberment, significant disfigurement, or permanent loss of the use of a body organ or member function, or system. Liability coverage includes limits of $10,000 per person, $20,000 per accident bodily injury and $5,000 for property damage.

Under the no-fault system there is a maxiuum of $50,000 for benefits which include medical costs, wage losses up to $1,000 per month for 3 years and replacement services loss at the rate of $25 per day for a year. In 1977 the legislature modified the law by:

> "Providing that a policyholder could elect to have his medical insurance policy be primary to the auto coverage. This would entitle him to a reduction in his auto premiums. In addition, it prohibited medicare recipients from dual recovery by making medicare the primary coverage. Wage loss payments were prohibited if there was no true loss of earnings. A fee schedule for medical expenses was enacted tying the fees paid for the medical benefits to the worker's compensation schedule. In addition to limiting medical expenses, the law was modified to limit legal expenses and establish a fee schedule for arbitration costs. There are other modifications relating to the extension of benefits for out-of-state travel and uninsured motorists provisions."

There was an attempt to eliminate the monetary threshold and go to a verbal threshold. But the monetary threshold was retained and the verbal threshold was broadened. The effect will probably be to increase accessability to the courts.

It appears that the New York plan has compensated most accident victims fully for their economic loss. It has not achieved its goal of spending less on smaller claims and more on serious claims, but it appears that the percentage of total injury payments to seriously injured victims has increased. In addition, more of the premium dollar is going to the injured victim. Prior to no-fault approximately 44¢ of every dollar went to the victim and after the first experience of no-fault, it appears that the injured victim is receiving 57¢. Also, it appears that the claims are being paid promptly. This is one of the objectives of the no-fault goal. The no-fault plan has not resulted in the savings which were initially anticipated.

Mr. Stewart and also Mr. Lawrence Monin, former deputy commissioner, now of Los Angeles, were both in favor of the no-fault plan. Mr. Stewart states that any proposal should be intellectually clean at least at its inception. He felt that if the New York plan has deficiencies these deficiencies were a result of modifications that were made through concessions during the Legislative process.

According to Mr. Sheridan Albert of the New York Trial Lawyers Association, the repeal of no-fault in New York was a possibility (this was not reported by others with whom we spoke).

Mr. Albert feels that because of the denial of access to the courts, a significant portion of the public in New York is disenfranchised. Mr. Albert alleged that insurance companies get additional premiums for no increase in risk. Under the collateral source rule there is an additional source without a decrease in premium. In addition, Mr. Albert claims that approximately 16% of New York's drivers were uninsured. He did feel that arbitration under a liability system was beneficial.

He also feels that the reason that the tort system case filings have declined is because of collateral source utilization. According to Mr. Albert, collateral source utilization allows the insurance companies a greater amount of money upon which to make profit. He advocates an approach to reduction of automobile insurance rates by: 1) reducing first party benefits to $5,000; 2) eliminating the threshold either verbal or monetary; 3) making payments of first party benefits only to basic amounts, a lien on third party action; 4) providing a reasonable fee schedule for health providers i.e. make one rate for the same service; 5) eliminating inter-company arbitration to eliminate double loss reserving; 6) establishing control over collision charges and losses since 65% of the total insurance premium is property damage coverage; 7) establishing a commission to investigate the insurance industry's bookkeeping practices reserve system, investment income profits and rate-making procedures; 8) increasing limits under liability policies to $25,000-$50,000.

NEW JERSEY

In New Jersey representatives of the Committee met with members of the Legislative Study Commission and the legislative staff person of the study commission together with James Sheeran, Insurance Commissioner, members of his staff, and Morris Brown, Esq. a plaintiff's attorney. The New Jersey legislative commission provided a meeting room and facilities for discussion with representatives from New Jersey Manufacturer's Insurance Company, Selected Risks Insurance Company, Prudential Property and Casualty Insurance Company, New Jersey No-Fault Study Commission and New Jersey Independent Insurance Agents along with representatives of the New Jersey legislative staff. The meeting was detailed and beneficial. The New Jersey plan provides for liability limits of $15,000 each person, $30,000 each accident, $5,000 property damage. The no-fault first party coverage provides for unlimited medical costs, wage losses up to $100 per week for a year, replacement services at the rate of $12 per day up to $4,380 and survivors benefits which match the wage replacement services benefit levels and funeral benefits to $1000. The benefits are to be paid within 30 days after the insured has furnished a written notice of the claim. Overdue payments bear interest at the rate of 10% per annum. The threshold is $200 for the reasonable and necessary treatment of injury to soft-tissue of the body. The $200 does not include hospital expenses, x-rays, or other diagnostic medical expenses. There is no exemption from the tort system if the injured party died or sustained permanent disability, permanent significant

disfigurement, prior loss of any bodily function or loss of the body member in whole or in part.

The plan allows subrogation by the insurer. However, the subrogation is carried out by inter-company arbitration or inter-company agreement. If the person liable for the accident is uninsured then the insurer may exercise its subrogation rights against such person in tort.

Even though the threshold in New Jersey is relatively low, it appears that there has been a significant decrease in automobile tort case filings. The combination of the low threshold with the unlimited medical benefits seems to blunt the enthusiasm for litigation. On the one hand, the recipient of the unlimited benefits is readily satisfied and on the other hand there is little basis for litigation necessary to interpret the threshold. However, the legislative study commission has recommended that New Jersey adopt a verbal threshold. It is the opinion of the members of the study commission that although litigation arising out of interpretation of threshold terms will increase, at some period in time this will level off and then diminish. The objection to the present threshold is that many insurance companies are capitulating on claims under the threat of suit. The insurers feel that they are paying more than the plan intended. One of the objectives of no-fault insurance program is to properly compensate claims regardless of their size. It is alleged that under the fault system, small claims are overcompensated.

According to Morris Brown, the past president of the Association of Trial Lawyers of America, New Jersey branch, the New Jersey no-fault plan has:

1. Reduced the automobile negligence case filings.
2. Resulted in claims for economic loss being paid more quickly.
3. Removed nuisance cases from the court system.

Mr. Brown feels that it is proper to consider legislation which removes the need to sue but not the right to sue.

The New Jersey Legislative Study Commission in studying no-fault recommends:

1. That the system be retained but with some modifications.
2. Automobile insurers should be maintained as primary providers of no-fault benefits. This refers to a collateral source utilization.
3. Continued exclusion of commercial vehicles, school and public buses, and motorcycles from the no-fault coverage. That passengers in non-private passenger automobiles, such as commercial vehicles, not be eligible to receive no-fault benefits. The assumption is that they are adequately covered under other insurance.
4. Unlimited medical benefits should be retained but liability of any one company should be limited to the first $75,000 with the excess to be pooled among all insurers and paid out of the unsatisfied claim and judgment fund.

5. Extension of the time period for payment from 30 to 60 days.

6. Elimination of the dollar threshold and adopting a verbal threshold.

There are other recommendations from the Commission, but are not discussed.

New Jersey was probably the most interesting state because of its combination of the low-dollar threshold and unlimited benefits.

INDIANA

Committee representatives also visited the Regional Conference of the National Association of Insurance Commissioners at Indianapolis and met with commissioners from Indiana, Kentucky, Pennsylvania and Florida. In addition to meeting with the commissioners, staff attended meetings dealing with uninsured motorists and compulsory coverage.

There were discussions with the commissioners of various aspects of their no-fault coverage. Generally, commissioners from states having no-fault plans endorsed the plans.

Indiana Commissioner H.P. Hudson stated that he was not a proponent of no-fault until called upon to do some research in the area in preparation for an appearance before a congressional subcommittee. He studied the experience of several states plus data from the federal government and changed his attitude toward no-fault. Under a proper no-fault plan, according to Commissioner Hudson four objectives can be reached:

1. Payments can be made more promptly to injured victims of automobile accidents.

2. More of the premium dollar can be made available to pay citizen benefits through the reduction of litigation and claims adjuster time and effort.

3. Tort recovery is limited to those suffering serious injuries and correspondingly court activity is reduced. It is a viable alternative to the third party liability coverage.

4. Insureds receive more benefits for the same money. According to Commissioner Hudson, one of the more damaging arguments in support of no-fault is the allegation that premiums can be reduced. The Commissioner does acknowledge that more benefits are available to the insured than are available through the tort system but states that premiums will not be reduced.

Commissioner Hudson believes it essential that insurance companies retain the right to subrogate paid first party benefits against the insurance company of/or the party who performed the wrongful act. Mr. Hudson felt that this is a very important aspect of any no-fault plan. He believes that without subrogation there may be a one-sided drain on some companies. The method of subrogation would be through inter-company arbitration except when an uninsured motorist is involved. If an uninsured motorist is involved, the paying company may resort to the tort system for recovery.

Mr. Hudson also estimated the number of uninsureds varies from state to state and the low is approximately one-half percent in Delaware and the high is 33% in the District of Columbia.

According to one of the study groups at the meeting the uninsured motorists comprise from 5%-40% of the drivers of any state. A survey was conducted among the 50 states of which 27 responded, 11 indicating that they conducted a survey and 16 indicating that they had estimated the number of uninsured motorists. From those that conducted a survey, the number of uninsured motorists ranged from 5%-35% and from those states that estimated, the range was from 5%-40%. Illinois estimates approximately 15% uninsured motorists statewide with approximately 40% in the Chicago area. Part of the discussion centered on the cost of insurance as being a disincentive to the purchase thereof. The reasons behind the high cost were also considered. Generally, the insurers indicate that the higher cost of medical services and automobile repairs is a major factor in premium increases.

The facts must be considered within the law in order to highlight the issues.

III

THE LAW

Motor vehicle liability insurance regulations are found generally in Insurance Code Sections 11628 and following and uninsured motorist coverage is found in Insurance Code sections 11580.2 and following. There are numerous Insurance Code sections applicable

to automobile insurance. California's Financial Responsibility Law is found in Vehicle Code section 16000 and following.

Among the more recent pieces of legislation relative to motor vehicle liability in the Public Laws of 1978 are:

Chapter 217 (AB 2262) amending Vehicle Code Section 22348 to retain the 55 mph speed limit.

Chapter 875 (AB 3596) amending Insurance Code Section 11628 to require the reporting of automobile accident loss statistics by zip code.

Chapter 974 (AB 2799) amending Vehicle Code Sections 1806, 16072 and 16075 providing that the 3 year license suspension for failure to file proof of financial responsibility is to commence at the date of the accident together with other provisions relative to hearings and records related to suspensions.

Chapter 997 (SB 1446) amending Vehicle Code sections 16000, 16021, 16070, 16025, 16251, 16377, 16430, and 16434 to provide, among other things, for an increase in the minimum amount requiring report of property damage accident. There is also a requirement that the required insurance cover the driver for the vehicle involved in an accident.

The code sections are based upon the concept of fault in automobile accident reparations but many of the sections relate to compensation of the injured rather than protection of the tort feasor's assets.

Because of the problems that arise out of the present auto-

mobile liability reparations system there has been concern that the courts of this state may not support an alternative system such as no-fault automobile insurance. In the case of Maloney v. Rath (1968) 69 Cal.2d 442, 71 Cal.Rptr. 897, Justice Traynor in the opinion stated, among other things,

> ". . . We are aware, however, of the growing dissatisfaction with the law of negligence as an effective and appropriate means for governing compensation for the increasingly serious harms caused by automobiles. (See, Ehrenzweig, "Negligence Without Fault," (1951); Keeton and O'Connell, "Basic Protection for Traffic Victim," (1965); Franklin, Replacing the Negligence Lottery, (1967); 53 Va.L.Rev. 774; Keeton, Is There a Place for Negligence in Modern Tort Law? (1967); 53 Va.L.Rev. 886 . . .)"

Justice Traynor also discussed the possibility of implementing a doctrine of strict liability in tort and automobile actions. However, Justice Traynor recognized the problems."

> ". . . To invoke a rule of strict liability on users of the streets and highways, however, without also establishing in substantial detail how the new rule should operate would only contribute confusion to the automobile accident problem . . . Only the Legislature, if it deems it wise to do so, can avoid such difficulties by enacting a comprehensive plan for compensation of automobile accident victims in place of or in addition to the law of negligence." (Maloney v. Rath, supra, at 446).

Therefore, the courts have invited the Legislature to enter into an alternate automobile insurance compensation system if the Legislature determines such system is warranted.

Apart from the alternate system issue, there are cases that arise under the present system which seem to point to the need for more definitive set of laws in the automobile liability insurance

area. In February 1973 the Supreme Court addressed the Guest Statute issue in the case of Brown v. Merlo (1973) 8 Cal.3d 855, 106 Cal.Rptr. 388. The case concerned Vehicle Code section 17158 which precluded recovery by an injured guest for the careless driving of his host unless the driver's action amounted to willful misconduct or involved intoxication. The Court in the opinion by Justice Tobriner examined the statute and the rationale behind the statute. According to the Court the reasons for the statute are found in " . . . (1) the protection of hospitality and (2) the elimination of collusive lawsuits. . ." (Brown v. Merlo, supra, at 859). The opinion states:

> ". . . [I]t completely ignores the prevalence of liability insurance coverage today, a factual development which largely undermines any rational connection between the prevention of suits and the protection of hospitality." (Brown v. Merlo, supra, at 859).

In his analysis Justice Tobriner states:

> "First, if the characterization of an injured guest's lawsuit as an act of 'ingratitude' ever had general validity, its rationality has been completely eroded by the development of almost universal automobile liability insurance coverage in recent years. Whereas in the late 1920's and 1930's the statute's operation might realistically have been viewed as relieving most generous hosts from potentially great personal expense, today with the widespread prevalence of insurance coverage, it is the insurance company and not the generous host, that in the majority of instances wins protection under the guest statute. Thus, in a day in which nearly 85 percent of the automobile drivers carry liability insurance, the statute can no longer sequester the defense that it is a necessary means to thwart 'ungrateful' guests. In plain language, there is simply no notion of 'ingratitude' in suing your host's insurer." (Brown v. Merlo, supra, at 868).

In attacking the statute the Court cited the case of Rowland v. Christian (1968) 69 Cal.2d 108 and stated:

> "A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Just as it is unreasonable to lower the standard of care owed to a visitor on private property because such visitor is 'only' a social guest rather than a 'paying' invitee, it is unreasonable to single out automobile guests and to expose them to greater dangers from negligence than paying passengers; in automobiles, as on private property, 'reasonable people do not ordinarily vary their conduct depending upon such matters." (Brown v. Merlo, supra at 870).

The Court went on and stated:

> "In summary, we have concluded that the classifications which the guest statute creates between those denied and those permitted recovery for negligently inflicted injuries do not bear a substantial and rational relation to the statute's purposes of protecting the hospitality of the host-driver and of preventing collusive lawsuits. We therefore hold that, at applied to a negligently injured guest, the guest statute violates the equal protection guarantees of the California and United States Constitutions." (Brown v. Merlo, supra, at 882).

As a gratuitous remark the Court again alluded to the possibility that the tort system was not the only method of achieving compensation in automobile liability cases.

> "Our holding, of course, in no way detracts from the principle that 'the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.' . . . Nothing we have said is intended to imply that only the common law rules of negligence can govern automobile liability. We hold only that in undertaking any alteration or reform of such rules the Legislature may not irrationally single out one class of individuals for discriminatory treatment." (Brown v. Merlo, supra, at 882).

In 1975 in the case of Schwalbe v. Jones (1975) 120 Cal. Rptr. 585, (Petition for Rehearing granted) the Court addressed the issue of the owner-guest being precluded from recovering against the negligent driver. After Brown v. Merlo, supra, the Legislature amended the law to preclude only the owners from recovering against the negligent driver of the owner's vehicle. The Court stated:

> "To reiterate, we believe that the Legislature's asserted desire to protect hospitality and prevent collusive fraud fails to systain the constitutionality of the present section 17158 just as it failed to support the guest rule itself. In similar fashion the claim that section 17158 encourages car owners to exercise control over persons who drive them fails to serve as a sufficient alternative justification.
>
> Thus section 17158 can claim no more constitutional viability than its predecessor." (Schwalbe v. Jones (1975) 534 P.2d 73, 78.)

The Court thereupon determined that the owner guest statute was unconstitutional. In March 1976 the Court after a rehearing of the matter, rendered another opinion in Schwalbe v. Jones (1976) 16 Cal.3d 514 sustaining the constitutional validity of Vehicle Code section 17158 as amended by the Legislature precluding owner recovery against negligent drivers of owner's vehicle.

In the case of California Cas. Indem. Exch. v. Hoskin, (1978) 82 Cal. App. 3d 789 the insurance company sought declaratory relief to determine whether an owner passenger injured in a vehicle driven by her son when it collided with another vehicle which was uninsured was entitled to recover under the Uninsured Motorist provisions of her policy. In an action against the other vehicle's owner

and against her son as driver of her vehicle, the trial court rejected the portion of the claim against her son as driver of the car under the uninsured motorist provisions and looked to the applicable statutory sections, i.e. Insurance Code sections 11580.1 and 11580.2.

In August of 1978 in the matter of Cooper v. Bray (1978) 21 Cal. 3d 841 the Court again addressed the issue of the constitutional validity of Vehicle Code Section 17158 as applicable to injured owner-passengers. The Court stated on page 844 of the opinion:

> "In April 1975, our Court initially concluded in Schwalbe v. Jones (1975) 120 Cal. Rptr. 585 that this statutory provision violated the constitutional equal protection guarantee. Thereafter, however, we granted a rehearing in Schwalbe and, upon rehearing, a majority of the Court sustained the statute against constitutional challenge (Schwalbe v. Jones (1976) 16 Cal.3d 514). After a careful reexamination of the issue, we have concluded that our original constitutional determination was correct and that, under the appropriate governing equal protection standard, the disparate treatment mandated by section 17158 cannot be constitutionally sustained."

The Court in declaring the statutory section unconstitutional made some interesting statements relative to the goal of legislation.

> ". . . [A]ll of the formulas require the court to conduct 'a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals.'" (Cooper v. Bray, supra, at 848).

These cases are not exhaustive of the issues that have come before the courts of the state of California and arise out of automobile accidents. They are indicative of the need for a simplifying procedure to accomplish the objectives of compensating injured

persons fairly and quickly.

The Staff of the Joint Committee believes that any statutory modification of the automobile liability system should consider the need to make the automobile drivers of the state accept the burden of the expenses that arise from the automobile system.

In addition, it is apparent that it is the automobile accident victims who are parties in the cases that have come before the courts. The property damage issues appear to be resolved more rapidly at a lower level.

There is a possibility of remedying the process and the courts have indicated a tacit approval of the Legislature's adopting a system of reparation which is not based upon fault.

IV

A POSSIBLE RESOLUTION

It is apparent from the data that has been presented that the uninsured motorist is a significant social problem. The consequences of his activity affect the lives of numerous residents of this and other states. The ultimate goal should be to make certain that the uninsured motorist is eliminated from the automobile operations system. Absent that there should be an attempt to make certain that people who are injured in automobile accidents are fairly and quickly compensated. Also, any proposed system should contain sanctions against the uninsured motorist. These sanctions could include no compensation from any portion of the system especially under any no-fault system. Ideally, as a condition precedent to filing a liability case, a plaintiff automobile

driver, should be required to show ability to respond in damages. In the alternative, such plaintiff should be required to show such proof before he is entitled to any recovery especially in cases involving comparative negligence.

The first solution for the problem and the one which will obviate the uninsured motorist difficulty is to implement a pay-as-you-drive insurance system. Ideally, the method of payment would be a surcharge on gasoline or other fuels used in motor vehicles. The insurance system to be financed by the surcharge would be a no-fault variety limited to bodily injury or personal injury protection. This would include the loss of wages up to a certain amount and loss of services. Because of the obvious administrative problems and the possibility of numerous fraudulent claims, property damage should not be included in the no-fault system nor as part of the surcharge. Motorists would still be required to obtain public liability and property damage insurance. The public liability protection would be for those cases which go beyond the threshold of the no-fault program and for accidents occurring outside the state of California. The property damage coverage would be applicable to property damage accidents occurring both inside and outside of the state of California. There are some obvious problems with the implementation of a pay-as-you-drive program, but by limiting it to personal injury protection under a no-fault system the problems are narrowed. A variation on this same process would be a compulsory insurance program wherein drivers on renewal of driver's licenses and on registration of vehicles

would be required to present proof of insurance for bodily injury or personal injury protection. A fully paid-up, non-cancellable policy of insurance would be required for that limited coverage. The term of the coverage would coincide with the period of automobile registration. Under California's system of staggered automobile registration the administrative problem connected with enforcement of compulsory insurance is lessened from that which it might have been. Additional sources of funds for the pay-as-you-drive proposal would be drawn from certain traffic violation fines and an additional charge on alcohol. These charges are based upon the factual correlation between certain driving conduct and accidents and the incidence of drinking drivers involved in fatal and injury accidents. A problem which should be met is the motorcyclist who is more often more seriously injured than an occupant of other motor vehicles. Their exposure under the no-fault system would be greater than the average motorist's injury exposure. And because motorcyclists use far less fuel in relation to the miles driven than do automobiles there would be a disparity in the premium paid by a motorcyclist under a pay-as-you-drive system vs. an automobile driver. For that reason there would have to be an additional registration surcharge for motorcyclists under the pay-as-you-drive system.

To implement the pay-as-you-drive system it would be necessary to gather certain statistical data relating to automobiles, the miles driven, the nature of accidents by type of automobile, i.e. small foreign cars, large cars. Also, actuarial data will have to

be compiled to determine the exposure under a no-fault system. The estimated cost of the exposure will be the anticipated payment for injuries, rehabilitation, lost wages and loss of services plus the administrative cost to implement the program. Absent from the costs would be sales' commissions and those costs related to assigned-risk plans and so forth.

From the 1978 Judicial Council Report to the Governor and Legislature, referring to 1976-77 data, there were 57,193 filings for motor vehicle/personal injury death and property damage matters. There were 28,411 other personal injury death and property damage filings and dispositions. The motor vehicle filings constituted 8.0% of the total filings in the Superior Court. Criminal filings for the same period numbered 54,682 or 7.7% of the total. However, this does not present an accurate picture on a weighted base since the criminal activity constitutes 29.3% of the Court's time. Motor vehicle accident/activity in the Superior Court remains approximately the same or is slightly less on a weighted basis. When considering modifications in the system to alleviate Superior Court the maximum reduction benefit could not exceed 8.0% of the Court's time.

Two things have occurred in the past year which should have impact on motor vehicle accident cases in the court system. Assembly Bill 2192 which amends Section 86 of the Code of Civil Procedure was enacted as Chapter 146 of the Laws of 1978 and will become effective July 1, 1979. This legislation increases the

jurisdictional limits of the Municipal Court to $15,000.00. Senate Bill 1362 which repealed Chapter 2.5 commencing with section 1141.10 of the Code of Civil Procedure and added a new Chapter 2.5 commencing with section 1141.10 to the Code of Civil Procedure established mandatory non-binding arbitration of those matters which were determined to be $15,000.00 or less.

The bill (SB 1362) permitted Municipal Courts to provide by rule for the mandatory submission to arbitration of certain at issue civil actions pending in the Municipal Court districts. This legislation also becomes operative July 1, 1979 and will terminate on January 1, 1985.

The majority of the automobile accident filings should fall below the $15,000.00 value limit for arbitration purposes in the Superior Court and in many instances will now fall within the jurisdiction of the Municipal Court. In any event, implementation of a no-fault automobile insurance system which is limited solely to bodily injury or personal injury protection will leave the approximately 320,000+ property damage accidents in the tort system. These accidents in large part will be within the jurisdictional limits of the Municipal Court and under a mandatory non-binding system will be subject to arbitration. This should result in almost a virtual elimination of the automobile accident case from the Superior Court. Only those cases which are catastrophic in nature and exceed the threshold will be filed in the Superior Court. As a point of clarification the threshold in the contemplated proposal is a multiple part threshold. The threshold

can be exceeded for purposes of exhaustion of the wage provision or for purposes of exhaustion of the loss of services provision. Suit could be brought on those issues. However, before pain and suffering could be an issue to be introduced in the proceedings, it would be necessary to satisfy the threshold which is pertinent to the personal injury protection portions of the coverage.

V

NO-FAULT

Assuming there are problems under the tort system and the present method of insuring for such tort liability, is there a substitute method of insurance compensation which should be utilized and, if so, what is the nature of that substitute? The traditional substitute is what is referred to as no-fault automobile insurance.

> "Basic requirements of a true no-fault plan are:
>
> (1) Alteration or complete elimination of the tort liability system in the handling of automobile accident reparations;
> (2) Whole or partial substitution of a compensation sywtem in the place of tort liability to handle automobile accident reparations;
> (3) A system probably made compulsory by legislation, assuring that there would be universal application of the substitute system.
>
> A pure no-fault system would completely eliminate tort liability (negligence) claims arising out of automobile accidents. It would apply to both bodily injury and property damage claims. Most no-fault plans thus far proposed apply only to bodily injury claims, leaving property damage claims to be handled under the conventional tort liability system. In addition, most plans provide only partial substitution of first party compensation for tort liability rights of action." (W. Rokes, No-Fault Insurance, 1971, p. 4.)

The term "no-fault automobile insurance" can claim no commonly accepted definition. Therefore, before launching into a discussion

of subject, it is necessary to define how it is used in this report. As used here, no-fault insurance is characterized (and distinguished from tort liability insurance) by three features:

1. Mandatory economic loss benefits are, to the extent of the no-fault coverage provided, available to all victims regardless of fault.

2. No-fault insurance benefits for economic loss supplant tort liability insurance for compensating the same loss.

3. Some restriction is placed on the victim's right to sue in tort for intangible damages (e.g., pain and suffering)." (United States Department of Transportation, State No-Fault Automobile Insurance Experience, 1971-1977, [1977], 1). A summary of the Department of Transportation report is included at the end of this report.

The no-fault concept with which we are dealing is that which has been defined above. The Department of Transportation State No-Fault Automobile Insurance Experience report, supra, analyzed no-fault programs in the states of Colorado, Connecticut, Florida, Georgia, Hawaii, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Dakota, Pennsylvania and Utah. Based upon the analysis of these plans, the report stated certain issues and reached certain conclusions. The report gives a history of the evolution of no-fault plans in the context of the existing system of insured tort liability. In another report, the Department of Transportation on March 26, 1971, issued a final draft entitled "Motor Vehicle Crash Losses and Their Compensation

in the United States." Within that report there were recommendations made relative to automobile insurance.

> "The principal policy recommendations which resulted from the Department of Transportation's study were:
>
> (1) That the existing system of insured tort liability should be supplanted by one based on first party, no-fault insurance, and that tort lawsuits and the adversary process should be eliminated the mass of accidents.
> (2) That this change should be made, if at all possible, at the state level, and that the states should be given a reasonable time to do the job." (Department of Transportation State No-Fault Automobile Insurance, 1971-1977, supra, p. 3).

Of the plans discussed in the 1977 Department of Transportation report, the Michigan plan was the closest to the recommendations of the Department of Transportation's study.

Some of the findings relative to the performance of state no-fault plans are set forth here.

A. Adequacy of No-Fault Benefits.

> " . . . From a nationwide household survey of 1976 respondents who were involved in accidents which resulted in serious injuries or fatalities, the study (The United States Department of Transportation, Economic Consequences of Automobile Accident Injuries, Vol. I) concluded that:
>
> [1] The automobile liability system compensates only about one-sixth of the economic losses of individuals in serious automobile accidents.
>
> [2] More than half of the individuals injured in such accidents receive no tort compensation at all.
>
> [3] The tort system overcompensates individual with minor claims and undercompensates individuals with severs economic losses. Persons with economic losses of $500 or less who are successful in obtaining compensation through

> tort action receive an average of four and one-half times their total economic losses. Persons with economic losses of $25,000 or more who receive tort compensation usually recover only 30 percent of their losses." (State No-Fault Automobile Insurance Experience, supra p. 14.)

Referring to a Massachusetts study, the report found:

> " . . . Thus the table indicates that, at the price levels which prevailed in 1972, Massachusetts' $2,000 limit on mandatory first party benefits was adequate to reimburse over 95% of the PIP claimants for their full economic losses." (State No-Fault Automobile Insurance Experience, supra p. 18.)

In three states having unlimited first party medical benefits, the report discusses catastrophic losses and their effect on such states. As defined, a catastrophic loss is one of $25,000 and over in medical expenses. The study found:

> " . . . As computed from these data, the average loss reserve per catastrophe claim is $72,918 in Michigan, $93,067 in New Jersey, and $82,281 in Pennsylvania . . . Under the tort liability system, the accident victim's attempt to recover compensation of such magnitude would have, in most cases, required the retention of a lawyer and the threat, and possible carrying out, of a lawsuit against the party alleged to be 'at fault.' As noted previously, the 1971 D.O.T. Auto Insurance Study found that, for accident victims with economic losses of $25,000 or more, only 42 percent recovered any tort compensation whatsoever, and the average tort recovery was only 30 percent of economic loss. The adversary nature of the system, its concomitant system costs, and uncertainty of recovery which characterize the tort system also discourage seriously injured accident victims from seeking the early and comprehensive rehabilitative care they need to recover as quickly as possible from their injuries." (State No-Fault Automobile Insurance Experience, supra pp. 20-23.)

The report discusses the effect of no-fault automobile insurance benefit availability on single car accidents. As it

was pointed out above, single car accidents account for a significant percentage of the injuries and fatalities in the state of California. This finding coincided with other states' experience where percentages ranged from 32% to 41% of the fatal and injury accidents involving only a single vehicle.

> " . . . The average loss reserve per claim for these single-car accidents is $107,128 in Michigan, $113,523 in New Jersey and $102,413 in Pennsylvania, amounts which are significantly higher than the average per claim loss reserve for the catastrophe claims as a whole in each of the three states. These seriously injured victims of single-car accidents generally would not have received any compensation at all under the tort liability system since there was no second party involved in any of these accidents upon whom responsibility for the accident might have been placed. Under the tort liability system, a certain percentage of the victims of the multi-car, motorcycle and pedestrian catastrophe accidents also would not be eligible to receive any tort compensation since they would be found to have been 'at fault' in the accident." (State No-Fault Automobile Insurance Experience, supra p. 23.)

The Kentucky Department of Insurance also made findings that approximately 16% of claimants with catastrophic injuries would not have recovered under the tort system in the state of Kentucky. Connecticut made a finding that approximately 25% more victims are able to recover economic losses under the no-fault than under the tort system.

> " . . . Another measure of adequacy is the ability of a no-fault system to provide first-party benefits to those accident victims excluded from tort benefits under the liability system. Such excluded victims are those individuals who for reasons previously discussed in this chapter, cannot successfully shift the financial responsibility for their accident losses to second parties under the tort system." (State No-Fault Automobile Insurance Experience, supra p. 26.)

> "In conclusion, all known evidence available to this study indicates that, in varying degrees depending on the particular State no-fault plan, no-fault automobile insurance accomplishes in practice what it was designed to do in principle; i.e., provide compensation for economic losses of accident victims in a manner more adequate and equitable than the tort liability system." (State No-Fault Automobile Insurance Experience, supra p. 31.)

B. Timeliness In No-Fault Benefits.

It would appear obvious that a no-fault plan which functions as designed would result in payments being made more rapidly than under the tort liability system where the condition precedent to any payment is the determination of liability.

Referring to the 1971 D.O.T. study, the State No-Fault Automobile Insurance Experience report states,

> " . . . As these tables show, the more serious injury cases typically took the longest time to settle, with almost 40 percent of the benefits ultimately paid still not paid one and one half years after the accident. The negative impact of such lengthy settlement times upon the victims of auto accidents is significant, particularly since these victims are already likely to be overburdened with concerns about recovering from their injuries and returning to their jobs. Such delays in settlement can also lead accident victims to postpone important rehabilitation therapy or force them to accept premature settlements which represent but a small fraction of their economic losses." (State No-Fault Automobile Insurance Experience, supra pp. 31-33.)

In addition, from information received by the Committee staff, it appears that there may be a correlation between duration of disability and time of payment. (In other words, the duration of disability will extend until the victim is sure he will get paid.)

A claim survey made by the state of Massachusetts determined that approximately 90% of the medical claimants under the personal injury protection coverage received their medical payments within two months of the claim and that approximately 85% of the wage claimants received their payments within two months of submission of the claim. This is not to say that the obligations were totally satisfied, but payments made on a basis of partial claims were timely paid and the injury extended over a long period. With the introduction of no-fault, the remaining tort cases tend to be of a more serious nature and the claim satisfaction time for those cases tends to increase over 'average time' for tort claims prior to no-fault. This is consistent with the theory of no-fault in that the removal of lesser claims from the system means the removal of the claims with the shorter period of disability and the less complicated and less severe injuries.

The State No-Fault Automobile Insurance Experience Report concludes that,

> "As was the case with adequacy of no-fault benefits, all available evidence points to the conclusion that no-fault benefits are being paid in a much more timely fashion than are insured tort liability benefits. This increase in the speed of payments is to be expected since first party, no-fault claims are inherently easier to process and pay than third party, tort liability claims which involve not only the determination of fault, but also the placement of the insurer and the claimant in the position of direct adversaries. It seems clear that no-fault, at least in the States examined here, is meeting its announced goal of providing insurance compensation for personal injury accident losses that is more prompt than that provided by the tort system." (State No-Fault Automobile Insurance Experience, supra p. 37.)

A very important aspect of a good no-fault plan, and for that matter an idea which can be implemented in the tort system, is that benefits should be coordinated with benefits potentially receivable from other forms of insurance such as medical coverage. Many people have health care insurance, workers' compensation insurance, social security disability benefits, and perhaps some other form of insurance coverage, which can be called upon in the event of an automobile accident. In multiple insurance coverage situations, by devising a plan which establishes priorities for the sequence in which various coverages will be used, it is possible to reduce the price for such multiple coverages. Under the collateral source rule, which precludes the mentioning of other benefits in the tort action, it is possible for an insured person to make a double recovery for the same loss. Although the particular injured person may feel this is a windfall benefit, it is really available only at the expense of higher premiums paid by the majority of other insureds. Statistically, the probability of being involved in an injury accident is extremely low for the average driver. Therefore, greater benefit would accrue from coordination of benefits among various policies since the benefit would be passed on to all insureds in the form of reduced premiums. Any plan which is recommended by the staff of the Committee will include a recommendation that insurance policies contain an option for the insured to elect among benefits at the time the contract is entered into so that the premium for the policy may be reduced accordingly.

> "The introduction of mandatory first-party no-fault automobile insurance in a given State can increase the potential for the duplication of insurance benefits if provision is not made to coordinate the new no-fault benefits with other types of insurance coverages, such as workers' compensation and health insurance . . . Such coordination should lower the cost of either auto insurance or other types of insurance (depending upon which type of coverage is designated as primary coverage) by preventing duplicate recoveries for accident-caused economic losses." (State No-Fault Automobile Insurance Experience, supra p. 37.)

> "The premium savings brought about by such coordination of benefits can be substantial. The New York Insurance Department has estimated that, if duplication between auto and health insurance coverages could be entirely eliminated, New Yorkers would save approximately $75 million a year in health insurance premiums. The Insurance Department's mandatory coordination between no-fault auto insurance and non-profit health plan (such as Blue Cross, Blue Shield) has currently reduced these health premiums by 2.5 percent. Similar coordination in New Jersey has resulted in a 3 percent reduction.

> "The Michigan Insurance Bureau has predicted that, if all its citizens elected the option of having the medical portion of their PIP coverage made secondary to their other health and accident coverages, they could save a total of $80 to $100 million annually under no-fault auto premiums. The Insurance Bureau has also estimated that the coordination of no-fault with workers' compensation and other government benefits has saved the auto insurance system in Michigan as much as $25 million per year . . ." (State No-Fault Automobile Insurance Experience, supra p. 39.)

"A survey conducted in Massachusetts found that most of the claimants were not abusing the no-fault system. In fact, this is significant because Massachusetts has the most litigious population of any state in a 19-state closed claims survey made by the Department of Transportation. (State No-Fault Automobile Insurance Experience, supra, p. 41.)

The State No-Fault Automobile Insurance Experience report, supra, concluded:

> "First, significant net premium savings appear to be available to policyholders in States which mandate the coordination of no-fault automobile insurance with other public and private insurance coverages. The findings of New York, New Jersey and Michigan support this conclusion. Second, the Massachusetts experience demonstrates that even litigation-conscious populations can and do modify their behavior under no-fault to make an apparently responsible use of no-fault and collateral source benefits to compensate their accident losses without pursuing duplicate recoveries." (State No-Fault Automobile Insurance Experience, supra p. 42.)

Among the items that are included in the liability system costs are the claimants' expenses such as attorneys fees and other litigation expenses and the insurers' attorneys fees and other litigation expenses, plus those administrative costs which go with the handling of the loss. In addition, the court costs have to be considered, especially if the case goes beyond the mere filing stage. Even though the case would not go to trial, there are court expenses involved in calendaring of the various phases leading up to trial, e.g. the trial setting conference, the actual time involved in the trial setting conference, the settlement conference calendaring and the time involved in the settlement conference. Also to be included is the court time involved in law and motion matters related to the case, even though the case never gets to trial.

> " . . . The data in table III-14 show that a major part of auto insurance premiums is consumed under the tort liability system by the investigation and litigation expenses that are inherent parts of a reparations system based on the determination of fault for each

> motor vehicle accident. The payment of first party, no-fault benefits dispenses with these cost-inefficiencies of tort liability in order to convert a greater percentage of the auto insurance premium dollar into net benefits for accident victims . . ." (State No-Fault Automobile Insurance Experience, supra p. 45.)

The implementation of a no-fault plan also theoretically should reduce the amount of court time. Although the State No-Fault Automobile Insurance Experience reports that approximately 17% of the court resources are utilized in motor vehicle accident litigation, the data from the California Judicial Council's report to the Governor and the Legislature do not contain sufficient qualitative information to make an assessment of the percent of time involved in automobile liability cases in the Superior courts.

The State No-Fault Automobile Insurance Experience report states:

> "The data presented for the no-fault states of Massachusetts, Florida, New Jersey and Michigan consistently show a decline in the level of motor vehicle tort litigation after the introduction of the tort restrictions that are part of the no-fault plans of these states. While there are factors other than no-fault which influence the level of motor vehicle tort litigation (such as accident rate and the litigiousness of the population) it seems clear from the court data that no-fault played a major role in these states in reducing tort actions."
>
> "It should be recognized, however, that there are several questions which these data cannot answer. First, the question of the amount of court resources in these states consumed by motor vehicle tort litigation in the post-no-fault period cannot be answered by the percentage decline in the number of tort cases. Tort restriction in these States typically remove the less serious tort cases from the court system, cases which presumably use less

> than the system's resources on a case-by-case basis than the more serious accident cases which are able to cross the tort threshold and remain in the tort system. The actual decline, then, in the use of the court system's resources by accident litigation will probably be some fraction of the decline in the number of motor vehicle torts, and would require additional research to determine the extent of the declines in the use of court resources in the no-fault states." (State No-Fault Automobile Insurance Experience, supra p. 57.)

The State No-Fault Automobile Insurance Experience study lacked empirical information on the impact of no-fault on the rehabilitation of auto accident victims but assumed that the lack of an adversary atmosphere would assist with the rehabilitation process. Among the plus features of no-fault are: focusing upon the needs of the injured rather than the fault issue; provision of financial security assuming availability of necessary services; diminishing the waste of transaction costs; avoidance of catastrophic financial drainage of victims' resources. (State No-Fault Automobile Insurance Experience, supra, at p. 59.)

The impact of no-fault upon insurance premiums is much debated. As is shown above, Indiana Insurance Commissioner H.P. Hudson advises that premium reduction is a point that should never have been given as a reason for no-fault auto insurance. No-fault provisions for Personal Injury Protection cannot be compared with Bodily Injury liability premiums without comparing the potential benefits. In Michigan and New Jersey the medical and rehabilitation benefits are unlimited. How can these benefits be compared with $30,000 or $40,000 maximum exposure under the Bodily Injury liability exposure in the tort system? To limit the inquiry

solely to the question of whether the premium went down is specious. The real question is what do you receive for the invested dollar. In this analysis, no-fault prevails.

VI

CONCLUSION

An attempt has been made to provide a frame of reference within which to properly view the automobile accident in the tort liability system. Some things to remember:

1. Approximately 35%-40% of fatal and serious injury accidents involve only one vehicle.

2. California is a comparative fault state.

3. The minimum limits of liability coverage including uninsured motorists coverage are $15,000 each person and $30,000 each accident.

4. It is estimated that from 14%-25% of California drivers are uninsured.

5. The average civil case in the Superior Court takes approximately 17 months from the filing of the at-issue memorandum to date of trial. (The low is 5 and the high 32 from the 20 counties surveyed in the Judicial Council Report.)

These factors demonstrate the logic of a no-fault auto insurance system.

It is staff's recommendation that the Legislature consider adoption of a no-fault automobile insurance plan which is limited to personal injury protection. Medical and rehabilitation benefits should be unlimited. Limited benefits for wage loss, services loss

and funeral expense should be included. The limited benefits should be periodically adjusted to reflect cost of living changes. The threshold can be verbal or monetary. Most of those intimately connected with no-fault plans recommend a verbal threshold. If a verbal threshold is adopted, it should incorporate the capacity to accommodate those situations involving relatively low medicals but resulting in non-remediable physical consequences, e.g. permanent scarring or disfigurement or loss of consortium. There are some accident consequences which are generally foreseeable, e.g. disfigurement or scarring and have significant psychological impact upon the victim. Analagous effects should be accommodated by the threshold.

Property damage should remain in the tort system. With the increase in Municipal Court jurisdictional limits to $15,000 and the availability of mandatory non-binding arbitration in matters determined to be $15,000 or less, most property damage cases will be removed from the Superior Court. The most frequent contact with automobile liability issues is the property damage occurrence. In those situations, especially most people, believe the at fault person should be liable. Leaving the property damage cases in the tort system will satisfy this feeling and at the same time will probably not be a burden upon the courts.

For an additional discussion of no-fault automobile insurance see Hiestand, F., "What's Right and Wrong With Auto No-Fault?" (1977) a copy of which is included with this report.

VII

RECOMMENDATIONS

1. The Legislature should follow through with former Senator Arlen Gregorio's resolution for a feasibility study of pay-as-you-drive insurance. Consideration should be given to variations of methods of payment in addition to a fuel surcharge. Pay-as-you-drive should provide for no-fault auto insurance, personal injury protection and bodily injury liability. Property damage should remain in the tort system and property damage liability insurance should be a required coverage purchased outside of the pay-as-you-drive system.
2. A no-fault auto insurance statute should be enacted with the following features:
   a. It be limited to personal injury protection for first party coverage.
   b. Property damage would remain in the tort liability system.
   c. Bodily injury and property damage liability would be additional compulsory coverages to apply to matters in excess of the threshold and to out of state accidents.
   d. Benefits would include:
      1. Medical care
      2. Rehabilitation and rehabilitative occupational training

3. Limited burial expense.
4. Limited replacement services loss i.e. those services performed by victim for benefit of self and family, not including economic losses.
5. Limited survivor's economic loss i.e. loss of economic contributions which decedent victim would have made to the survivors not including services of decedent and less expenses attributable to decedent.
6. Limited survivor's replacement services loss i.e. those services which would have been performed by decedent victim for benefit of surviving members of family not including economic losses.
7. Limited income loss i.e. loss of income from work the victim would have performed but for injury plus expenses for services in lieu of his work to produce income, less income from substitute work that victim has done or should have done and was capable of doing.

e. Motorcycle occupants would be excluded from the no-fault system and would be able to utilize the tort system for all losses.

f. No-fault benefits would be available outside the state.

g. Threshold. Resort to the tort liability system would be allowed when:

1. The accident involved intentional harm.
2. Damages for replacement services, survivors' economic, survivors' replacement services and income losses not recoverable because of the limitations thereon under basic benefits.
3. Damages for non-economic detriment but only if the accident results in death, serious permanent disfigurement, or 180 days of continuous disability as hereinafter defined. To this part of the threshold should be added the concept of scarring or other detriment discussed above. Disability would mean inability to perform some gainful occupation for which suited or qualified.

h. The entity paying the reparation benefits has the right of subrogation against uninsured motorists and, to the extent a cause of action exists in favor of the victim, for reimbursement of basic reparation benefits.

i. Public entities, federal, state and local and self-insurers should provide security for basic reparation benefits.

j. Public liability limits shall be a minimum of $25,000 for bodily injury for each person, $50,000 for each accident and $15,000 for property damage.

k. Provision shall be made for collateral source benefits utilization with the basic reparation benefits being primary.

l. The insured shall be entitled to elect deductibles for the basic benefits in increments to a maximum of $1,000.

m. Premiums for the basic reparation benefits shall be adjusted to reflect deductibles and collateral source benefits.

n. The insurer may offer excess coverages in all areas and various form of collision and comprehensive property protection coverages.

o. Provision shall be made for claims by pedestrians and other persons who may not be insured except that such insurance benefits are not available to uninsured motorists.

p. Basic benefits are to be paid within 30 (or 60) days of the presentation of the claim. Payments not timely made are subject to 18% per annum interest. Payments made based upon fraud or intentional misrepresentation of a material fact may be recovered by the payor and any sum authorized to be recovered shall bear interest at the rate of 18% per annum and, in any action therefor, in which the insurer entitled to recover the amount paid, such insurer shall also be entitled to reasonable attorneys fees.

q. Insurers, i.e. any person or entity required to provide insurance or security, refusing any claim shall give written notice of such refusal to the claimant and specify the reason therefor.

r. If any claimant brings an action against an insurer for any claim previously rejected and recovers such claim or a portion thereof, such claimant will be entitled to reasonable attorney's fees in addition to interest on such recovery.

s. Provision should be made for physical examination of the claimant through notice to the Court if there is a matter in issue involving the mental or physical condition of the claimant. Provision for the physical examination should also include limitations on discovery sufficient to protect individual rights outside of the matters in issue.

t. Some provision should be made to assure that the rates established for the coverages should be based upon factors which logically relate to exposure.

u. Out-of-state insured motorists would be deemed to have basic no-fault benefits when in California.

3. Vehicle Code section 16056 should be amended to increase limits for bodily injury, each person to $25,000, each accident $50,000 and property damage $15,000. Pursuant to Insurance Code section 11580.2 this will result in the same limits for uninsured motorists coverages.

4. Further investigation should be made of insurance rating practices especially the use of territorial and age and sex factors. An attempt should be made to assure a logical relation between the exposure of the insured and the premium for the coverages provided.
5. In the interest of addressing one of the significant contributing causes of fatal and serious injury accidents -- excessive speed -- staff recommends funds be allocated to the California Highway Patrol for purchase and utilization of radar speed detection devices.

E X H I B I T A

SUMMARY OF U. S. DEPARTMENT OF TRANSPORTATION, "STATE NO-FAULT AUTOMOBILE INSURANCE EXPERIENCE, 1971-77"

June, 1977

Summary of Report's Purpose and Methodology

State no-fault automobile insurance is evaluated in a comprehensive study made by the U. S. Department of Transportation, 1971-1977. Information and background materials gathered from the study were directly solicited from a wide variety of sources, including the American Bar Association, the National Association of Insurance Commissioners, all of the major insurance industry trade associations, a number of large individual insurers, and the insurance commissioners of sixteen no-fault states.* Public input was solicited through the medium of a General Register Notice. The study does not represent any significant original empirical research, nor does it reflect current state legislatures' attempts to modify their no-fault plans for the purpose of correcting deficiencies.

Definition of No-Fault Insurance

The term "no-fault" automobile insurance, as used in the context of the report, is defined (and distinguished from insured tort liability insurance) by three criteria:

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*The sixteen states having no-fault automobile insurance plans are: Colorado, Connecticut, Florida, Georgia, Hawaii, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Dakota, Pennsylvania and Utah. Puerto Rico, a territory subject to U. S. jurisdiction, also has a government-run no-fault insurance plan.

1. Mandatory economic loss benefits are, to the extent of the no-fault coverage provided, available to all victims regardless of fault;

2. No-fault insurance benefits for economic loss supplant tort liability insurance for compensating the same loss;

3. Some restriction is placed on the victim's right to sue in tort for intangible damages (e.g., "pain and suffering").

Survey of Current No-Fault Plans

Since 1970, sixteen states have enacted legislation establishing no-fault automobile accident reparations involving mandatory first party insurance and some degree of restriction on tort liability. While individual state plans differ widely in terms of benefit levels and degree of restriction on tort liability, in general all plans are considered to be quite modest. Inflation has served to erode these modest benefits and the cost-saving effectiveness of the tort restriction. It is suggested that an assessment of the performance of no-fault at the state level should keep in mind this problem in addition to those outlined below.

No-Fault Insurance and Selected "Problems" of the Automobile Accident Reparations System

Unlimited Medical Benefits and the Small Company Problem: "Unlimited exposure" with respect to medical benefits causes problems for insurers in that loss reserves can be determined only with great difficulty. While insurance actuaries have a number of sophisticated analytical tools to help them establish loss reserves, judgment does play a large role. As uncertainties increase in the

case of no-fault, judgment becomes particularly important in determining "cost" from the viewpoint of the insurance industry. Also, while the catastrophically injured victim is statistically rare, a disproportionate distribution of occurrences could theoretically occur causing small insurance companies to face financial responsibility beyond their prudent risk-taking abilities. Small insurance companies typically reinsure all or a portion of the risk with another insurer (termed reinsurance) and cede them a portion of the premium received. With the option of rejecting the risk under insured tort liability eliminated by the no-fault plan, small insurance companies must either pay the competitively increasing price of reinsurance or drop out of business. Thus small insurers, unable to economically spread risk, find themselves to be competitively disadvantaged relative to the larger insurance companies. One solution advanced is to pool all exposures above a certain limit and pay benefits out of a central fund.

Tort Threshold: The principal cost saving device common to all no-fault plans is a restriction limiting certain losses that can be recovered in tort. These are categorized into two types, the "dollar threshold" and the "verbal threshold." Plans adopting the former set some pre-determined "threshold" limit on medical costs. A victim may sue for intangible damages only after this limit is exceeded. Thresholds have been criticized for being too low, or as representing "targets" for victims and their lawyers to "shoot at." As previously noted, the cost-saving effectiveness of such a plan tends to be eroded by inflation or

other exogenenous factors. The verbal threshold, stipulating that a victim may sue for intangible damages only in the case of death, serious permanent disfigurement, or total disability for a fixed period of time, was created to deal with the problems arising from dollar threshold plans. Despite anticipated problems in the interpretation of verbal thresholds, they seem to be working reasonably well.

Insurance Availability: With the general tightening of insurance markets during the recent period of inflation and recession, auto insurance availability problems burgeoned in both fault and no-fault states. Insurance availability--i.e., the ability of the motorist to purchase the desired coverage in the voluntary market at rates which, all other things being equal, could be characterized as "reasonable"--was a problem before, and is likely to continue to be a problem in the future unless new mechanisms for handling the residual (i.e., involuntary) insurance markets are implemented. There is an aspect of no-fault insurance plans that does relate directly to the problem of insurance availability, i.e., the compulsory nature of the motorist's participation in the system. No-fault, because of its compulsory nature, greatly increases that pressure on motorists who might otherwise not buy insurance. Among this category of motorist are many who find it difficult to obtain voluntary insurance coverage in the standard market or assigned risk program.

In the final analysis, however, insurance availability is a function of the competitive environment which, along with rate

adequacy and the insurance classification, are factors which are equally applicable to both fault and no-fault systems.

Summary of Findings Regarding No-Fault Benefits and Costs

A. Adequacy of No-Fault Benefits: All known evidence indicates that state no-fault plans, in varying degrees, provide more adequate and equitable benefits than the tort liability system.

1. There has been a major increase in the percentage of paid claimants, such as those injured in single vehicle accidents, who would not have been compensated under the tort system.

2. Available evidence suggests that the number of tort bodily injury lawsuits has fallen with the introduction of personal injury protection coverage.

3. Given the universality of coverage under the various no-fault plans, it can be reasonably assumed that a far greater proportion of victims are now being compensated at some level for their economic losses than under insured tort liability.

B. Timeliness of No-Fault Benefits: The goal of providing more prompt payment of economic loss appears to be achieved under the no-fault system.

C. Coordination of No-Fault Benefits: The effective coordination of benefits from various compensation systems affects the potential for savings in all such systems. While data on coordination of no-fault benefits with other insurance coverages are sparce, significant premium savings appear to be available where benefit coordination is possible.

D. The Administrative Cost Efficiency of No-Fault: The decline in the number of first-party, no-fault claims reflects a clear shift from inefficient third-party benefits towards more efficient first-party benefits. Although the quantitative evidence is meager, being reflected chiefly in the relative reduction in claims personnel, this would appear to indicate that cost efficiency has improved with no-fault.

E. Impact on the Court System: Available evidence indicates that the burden on the courts and the legal system is being reduced.

F. Cost and Price Experience Under No-Fault: By its very nature, no-fault reform implies a trade-off between cost saving features and higher economic loss benefits. Depending on the trade-off chosen, any particular no-fault plan can result in higher, lower, or no change at all in premiums charged. Benefit maximizing no-fault plans must be accompanied by strong cost-saving features if insurance prices are to be held in check.

1. Inflation would appear to have been the principal factor for insurance premium increases in both tort and no-fault states during the last six years, although other factors such as shifts in accident frequencies and severities, inadequate thresholds in some no-fault states, inflation in jury awards and claim settlements, et cetera, have also obviously affected insurance costs and prices.

2. The experience of the states, taken overall, does indicate that increased benefits under no-fault can be achieved through improved cost-efficiency and that no-fault does not

necessarily mean higher insurance premiums, once inflation and other factors are taken into consideration.

E X H I B I T B

December, 1977

78-70

WHAT'S RIGHT AND WRONG WITH AUTO NO-FAULT?

By Fred J. Hiestand*

I. Introduction

No-fault automobile insurance has been hailed as "the one incontestably successful reform of the 1960's,[1] one that is clearly "in the interest of the public -- automobile owners, as well as potential automobile accident victims"[2] -- and also decried as a scheme that "would certainly lead to the simultaneous destruction of the dignity of the individual and the evenhanded justice of the common law."[3]

This memorandum briefly 1) sets forth the major differing concepts of automobile no-fault insurance and 2) summarizes the available evidence indicating whether, in states where no-fault has been enacted, it has achieved its purported goals.[4] Emphasis will

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1 Moynihan, Forward in O'Connell, Ending Insult to Injury xi (1975).

2 Editorial, "No-Fault Would Help the Poor", Sacramento Bee, October 10, 1977.

3 "Counsel Refutes Basic Program Proposed for Traffic Victims", The National Underwriter, November 18, 1966, p.2.

4 A later memorandum will be provided to the Assembly leadership of the California Legislature analyzing various features of specific auto no-fault statutes.

be focused on Michigan's no-fault automobile law because, by general consensus, it most closely approaches a "pure" no-fault law.[5]

II. What is Auto No-Fault? -- The Doctrinal Debate

No-fault automobile insurance is a term fraught with ambiguity. One authority lists three requisites of "true", as opposed to "pseudo", automobile no-fault:[6] 1) alteration or complete elimination of the tort liability system in the handling of automobile accident reparations; 2) whole or partial substitution of a compensation system in the place of tort liability to handle automobile accident reparations; and 3) a system, probably made compulsory by legislation, assuring that there /will/ be universal application of the substitute system. This same authority defines a "pure" no-fault system as one that

> would completely eliminate tort liability /negligence/ claims arising out of automobile accidents. It would apply to both bodily injury and property damage claims.[7]

Jeffrey O'Connell, a law professor at the University of Illinois who collaborated with Professor Robert Keeton at the Harvard Law

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5 O'Connell, "Operation of No-Fault Auto Laws: A Survey of Surveys", 56 Neb. L. Rev. 23, 27 (1977). Hereinafter cited as O'Connell, Survey, supra.

6 Rokes, No-Fault Insurance 5 (1971), defines a pseudo-no-fault proposal as one that "merely provide/s/ an extension of the medical payments, disability, accidental death, uninsured motorist and/or property damage coverage without altering the basic tort liability system". Id. at 4.

7 Id. at 5.

School in an early seminal work advocating automobile no-fault,[8] defines a "pure" no-fault plan as "eliminat/ing/ all, or almost all, claims based on fault and substitut/ing/ relatively unlimited benefits for all medical expenses and wage loss/es/ no matter how extensive."[9] O'Connell further distinguishes between "modified no-fault" plans which provide "only modest no-fault benefits . . . and eliminate only relatively few fault-based claims"[10] and "add-on plans", which "call for usually modest benefits to be paid traffic victims without regard to anyone's fault . . . /but/ do not eliminate any victim's right to press a fault-based claim for his pain and suffering against other drivers."[11]

A recent study released by the U.S. Department of Transportation, on the other hand, defines automobile no-fault insurance as comprising three requisite features:[12] 1) mandatory economic loss benefits are made available to all victims regardless of fault; 2) the economic loss benefits supplant tort liability insurance for compensating the same loss; and 3) some restriction is placed on the victims right to sue in tort for intangible damages (e.g. pain and suffering).

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8 Keeton and O'Connell, "Basic Protections - A Proposal for Improving Automobile Claims Systems", 78 Harv. L.Rev. 328 (1964).

9 O'Connell, "Survey", supra. at 27.

10 Id. at 26.

11 Id. at 27.

12 State No-Fault Auto Insurance Experience 1971-1977, U.S. Dept. of Transportation, June 1977. Hereinafter cited as DOT Study.

The difficulty encountered in studying the comparative viability of various state no-fault laws -- apart from their newness and the resultant dearth of useful statistics -- is apparent from these differing concepts of what constitutes automobile no-fault. Even worse, no two statutes providing for automobile no-fault in the various states which have enacted them are identical. Variations are substantial enough to cause confusion and concern amongst motorists who desire to know the possible consequences of accidents occurring while driving outside their home state, and to make any statistical comparisons of state no-fault implementation difficult. Most of the laws, for instance, contain some kind of partial tort exemption. Besides providing benefits without regard to fault to cover losses resulting from bodily injuries caused by car accidents, some statutes eliminate certain tort claims for specified injuries. Generally these claims are for injuries of a less serious nature, whether defined by a dollar or verbal threshold. Those who suffer more serious injuries often retain their tort claims, along with new no-fault benefits. Some statutes dovetail these two kinds of benefits in order to avoid double recovery for a single loss item -- and to also avoid double costs for the system. Others do not.

Professor Robert Keeton recently classified two states as eliminating tort recoveries for minor injuries only -- New Jersey and Connecticut. Thirteen, however, eliminated tort recoveries for minor and substantial injuries, but preserved tort recoveries for what were moderate, serious and severe injuries. These states, according to Keeton, are Colorado, Florida, Georgia, Kansas, Kentucky,

Massachusetts, Minnesota, Nevada, New York, North Dakota, Pennsylvania and Utah. Two other statutes eliminate tort recoveries for minor, substantial and moderate injuries but preserve tort recoveries for serious and severe injuries. These are statutes in Hawaii and Michigan.[13]

III. Is No-Fault Meeting Its Objectives? The Michigan Law

Because Michigan's is the main law extant to meet the proposed federal legislative standards, and the closest approximating a "pure" no-fault approach,[14] it is the most useful for testing the efficacy

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13 Hearings on H.R. 285, H.R. 1272, H.R. 1900, H.R. 7985, and H.R. 8441 before the Subcommittee on Consumer Protection and Finance of the House Committee on Interstate and Foreign Commerce, 94th Cong., 1st Sess., Ser. 94-42, at 676 (1975) (testimony of Robert Keeton).

14 Of all the states with some claimed form of auto no-fault (O'Connell lists twenty-four and the Dept. of Transportation sixteen under their varying definitions), only two, Michigan and Florida, meet the standards proposed by the pending federal legislation to set minimal standards for state no-fault. S1381 and H.R. 6601, 95th Cong. 1st sess. (1977), if enacted, would preempt nearly all state no-fault laws in some respects. The eight no-fault states which have no tort restrictions would have federal restrictions imposed upon them in conformance with federal standards. Only Michigan, New Jersey and Pennsylvania have first party medical benefits which would meet or exceed federal first party medical benefit standards. The federal legislation would require the twenty-six states which do not have no-fault to alter their auto insurance systems. Under this proposed legislation, a state has up to three years to comply with the federal no-fault standards. A state which does not adopt the minimal federal standards will have them imposed upon it and administered either by the state or by the U. S. Secretary of Transportation. H.R. 6601 failed in the Senate in the spring of 1976 after a tense roll-call vote of 49-45. "According to one account, at the end of the voting the motion /to recommit/ was ahead by only one vote, with a tie being the same as defeat /for no-fault/. Senator Frank Moss (D-Utah), floor leader for the bill, changed his vote so as to be able to move to reconsider the motion after Senator Clareborne Pell (D-Rhode Island) could get to the floor. But Senator Wendell Ford (D-Kentucky) misunderstood the switch and altered his vote as well . . . The later motion by Senator Moss to reconsider the motion to recommit lost 45-47. Wall St. J., April 1, 1976 p.2, col. 2.

of the purported purposes underlying no-fault. These purposes, as stated by O'Connell, are to make the following improvements in auto accident compensation:[15]

1. Extend economic benefits to a broader range of the population injured in automobile accidents.

2. In extending these benefits, to spend less on smaller, relatively trivial claims and more on serious injury.

3. To pay claims promptly.

4. To pay claims more efficiently by using less of the premium dollar on insurance overhead and legal fees.

5. To reduce the amount of litigation and court congestion stemming from auto accidents.

6. To reduce -- or at least stabilize -- the costs of automobile insurance.

In so far as statistics from other states with various kinds of no-fault can help to determine how well a pure no-fault system like Michigan's can achieve its stated goals, they will be referred to, but emphasis will necessarily be placed on the Michigan experience.

Michigan's automobile no-fault insurance statute was enacted October 31, 1972, and took effect on October 1, 1973.[16] Under Michigan's law, accident victims cannot sue in tort for non-economic

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15 O'Connell, "No-Fault Insurance: What Is It, How Is It Doing, Where Is It Going?", Address of Professor Jeffrey O'Connell delivered before the faculty and law students of the University of Texas, School of Law, June 21, 1977.

16 Mich. Comp. Laws Ann. Sec. 500-3101 - 500.3179 (Supp. 1975).

damages unless the injuries result in death, serious impairment of a body function or permanent serious disfigurement.

All motor vehicles with more than two wheels are covered under the law. Liability insurance is compulsory, with limits of at least $20,000 per person, $40,000 per accident for bodily injury and $10,000 for property damage.

No-fault medical benefits in Michigan are unlimited, and first party benefits also cover wage loss up to $1,285 per month for three years, replacement services at a rate of $120 per day for three years, survivors' benefits up to $1000 per month for three years and funeral benefits of $1000. The benefits are primary except as to benefits provided under state or federal law; but insureds may elect to have their health insurance coverage coordinated with, rather than duplicated by, auto insurance benefits for medical expense.

A. Extending Benefits to More Victims

In a report to the Governor of the State of Michigan, the Insurance Commissioner for Michigan stated that "the Michigan no-fault law is fulfilling its primary objective of . . . compensating many victims who would have been either under-compensated or received no benefits under the prior liability system."[17] Queried as to the statistical basis for this statement, the Commissioner's office

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17 "No-Fault Insurance After Three Years", A Report to the Governor, Insurance Bureau, Michigan Dept. of Commerce 4 (1976). Hereinafter "Report to the Governor".

reported that the basis for the conclusion was "that the Department of Transportation study showed

> that less than 50% of the economic loss of seriously injured auto accident victims was recovered under tort. Michigan no-fault automatically provides for all medical and rehabilitation costs without limit, plus up to three years of wage replacement, services replacement or survivors' benefits. These features would appear to cover most, if not all, of the economic losses suffered by accident victims, as far as the amount compensated goes."
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> "But even more significantly, many people previously injured in auto accidents receive little or no compensation because they could not prove that another party was at fault. In the case of single car accidents or accidents where the injured party may have been contributory, there was no basis for tort liability. By its very nature of not having to prove that someone else was at fault, but simply compensating injured persons, no-fault must provide benefits to more people since more accident victims are eligible for insurance coverage under no-fault."[18]

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18 Letter from Mrs. Jean Carlson, Deputy Assistant Commissioner, Michigan Insurance Bureau to Fred J. Hiestand, Counsel to Joint Committee on Tort Liability, California Legislature, dated July 11, 1977 (emphasis added).

The most recent Department of Transportation study on the operation of automobile no-fault insurance in sixteen states, cautions that their study "cannot . . . be considered definitive" because "survey data are not available to compare 'the economic loss and insurance compensation from pre and post no-fault accident victim surveys in each of the sixteen no-fault states.'[19] The DOT study does conclude, however, that "in the absence of such data . . . the existing research information on the adequacy of no-fault benefits does appear to constitute a strong case that no-fault is compensating more accident victims more completely and more equitably for the economic losses than did the tort liability system."[20]

Finally, the DOT study compiled data comparing pre no-fault bodily injury claim frequencies with post no-fault personal injury protection claim frequencies for selected no-fault states. The study commented that "these frequency data are influenced by factors other than no-fault, such as the annual accident rate in each state /and/ the huge jumps in the frequency of paid claims, even in the face of such countervailing forces as the lower accident rates caused by the 1974 gas shortage."[21] Nonetheless, the study concluded that the frequency increase in compensation between pre no-fault and no-fault can "only be explained by the conversion from third

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19 DOT Study, supra. at 30.

20 Id. at 30-31.

21 Id. at 30.

party tort liability systems to first party no-fault systems in these states. This conversion allowed for the substantial numbers of accident victims who could not qualify for insurance benefits under tort to receive compensation for their economic losses under no-fault"[22] Specifically, Michigan showed a paid claim frequency of 13.5 claims per 1000 insured cars in 1972, the year before the enactment of the no-fault statute, and a combined rate of 26.6 in 1973, with 17.1 being the personal injury protection paid claim frequency.[23] Thereafter, the personal injury protection claims frequency averaged 14.5 from 1974 to 1976.

B. Distributing Benefits More Equitably

Michigan's no-fault law retains tort liability only in cases of death, serious impairment of bodily function or permanent serious disfigurement.[24] The theory underlying this limitation is that less of the benefits paid out to the injured victim would have to go for legal fees and injured persons would receive more prompt and adequate compensation. Minor cases would theoretically be settled quickly without expensive and protracted legal proceedings. The 1976 report to the Governor of Michigan notes that "a complete evaluation of the effectiveness of the so-called threshold in the law in eliminating minor injury tort liability cases is premature. However, evidence is growing that the threshold has resulted in a

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22 Id.

23 Id. at 28.

24 Report to the Governor, supra. at 2.

significant decline in the number of minor tort liability claims and liability suits filed."[25] Data supplied to the Insurance Commissioner by the Michigan Association of Insurance Companies (MAIC) from its members shows a substantial reduction in private passenger automobile bodily injury liability claims since no-fault was enacted. According to this data, liability claims decreased from 163,369 in 1973 (which included three months of no-fault) to 21,553 in 1975 -- an 87% decline.[26] The shift from tort liability claims to first party no-fault personal injury protection claims is also significant. Personal injury protection claim frequency increased from 23,925 in 1973 to 61,178 in 1975, a 61% increase.[27] The MAIC companies providing this data write approximately one-half of the private passenger automobile insurance business in the state of Michigan.[28]

The report to the Governor of Michigan concludes that "the evidence to date indicates that the goal of reducing or eliminating the costs associated with small, non-serious claims while still compensating those who suffer injury is being met by no-fault."[29] Similarly, Professor Joseph Little of the University of Florida

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25 Id. at 8.

26 Id.

27 Id.

28 Id.

29 Id.

Law School found in his Florida study of automobile no-fault that a "shift to greater payments for more serious injuries is clearly seen" under no-fault as compared to fault-based payment.[30]

The Insurance Commissioner of Michigan has emphasized that under no-fault "a larger proportion of accident victims are eligible for compensation . . . plus the benefit coverages are very broad and virtually automatic."[31] Thus a fortiori, the most seriously injured receive more adequate compensation under no-fault than under the negligence system. The Insurance Commissioner's office has noted that it hopes "to include data from the reserving practices of insurers demonstrating the reserves for serious losses pre and post no-fault" in their next report.[32]

C. Promptness In Payment of Claims

The DOT Study observes that "key criteria in judging the compensation performance of state no-fault plans is the timeliness of the delivery of no-fault benefits. Compensation for economic losses that is adequate in dollar amount but long delayed in arrival cannot be termed 'adequate' compensation because it can force the accident victim to bear the financial burden of the accident-caused losses during the period between accident and settlement."[33]

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30 Little, "No-Fault Auto Reparation in Florida: An Emperical Examination of its Effects", 9 Mich. J. L. Reform 1, 36 (1975).

31 Letter from Jean K. Carlson to Fred J. Hiestand, supra.

32 Id.

33 DOT Study, supra. at 31.

The Michigan Insurance Bureau states that almost all auto accident claims are settled within 30 days.[34] However, Professor Little found that while the first payment in Florida to victims is made much more promptly, if anything, the total time taken to finally settle claims increases under no-fault.[35] He speculated that this may well be due to a more relaxed attitude on the part of victims about the need to finally settle since they are receiving no-fault benefits periodically as losses accrue, whereas they must wait for one final lump sum settlement, as bills and wage losses pile up, under fault-based claims. Professor Little concluded that "owing to the change in the pattern of claim modes, it is difficult to conclude from these analyses that claimants are better or worse off under no-fault than before with regard to speed of claims and processing. Nevertheless, on balance the speeding up of receipt of first payment appears to be a favorable result for claimants.[36]

The Michigan Commissioner of Insurance reiterated recently that "based on reports from our Consumer Assistance Division, we believe that virtually all no-fault claims receive at least partial payment within thirty days. The number of complaints alleging slow payment are negligible for bodily injury no-fault claims."[37]

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34 Report to the Governor, supra. at 1.

35 Little, supra. at 35.

36 Id.

37 Letter from Jean K. Carlson to Fred J. Hiestand, supra. The Commissioner of Insurance attributes some delay in the settlement of property damage claims "as a result of" Shavers v. Attorney General, 65 Mich. App. 355, 237 N.W. 2d 325 (1975), a case holding unconstitutional the provisions of Michigan's no-fault auto law abolishing tort liability for property damage.

The DOT Study concludes that "no-fault benefits are being paid in a much more timely fashion than are insured tort liability benefits. This increase in the speed of payments is to be expected since first party, no-fault claims are inherently easier to process and pay than third party, tort liability claims which involve not only the determination of fault, but also the placement of the insurer and the claimant in the position of direct adversaries. It seems clear that no-fault, at least in the states examined here,' is meeting its announced goal of providing insurance compensation for personal injury accident losses that is more prompt than that provided by the tort system."[38]

D. More Efficient Payment of Claims
By Reducing Insurance Overhead and Legal Fees

A 1971 study by the Department of Transportation found that the "auto insurance /tort liability/ system in 1968 was so inefficient that it took more than one dollar in system costs to deliver one dollar in net compensation to the victims of auto accidents."[39]

In theory, of course, no-fault systems are more efficient than tort liability systems because no-fault does away with many of the litigation expenses and over-payment of small claims that so inflate the tort system. "When mandatory first party benefits for economic losses are combined with restrictions on tort actions for minor auto accidents, much of the claimant's expenses, insurer's claims, expenses and costs of providing court resources for auto accident cases should in theory disappear."[40] Any reduction in system costs

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38 DOT Study, supra. at 37.

39 Id. at 42.

40 Id.

should also allow a higher percentage of premium dollars returned in the form of first party, no-fault benefits to the victims of auto accidents.

Michigan reports that "a full analysis of the efficiency of /its/ no-fault system has not been completed. Sufficient time has not elapsed since the effective date of the law."[41] The recent DOT Study noted that "while it would be desirable to test this hypothesis of the greater cost efficiency of no-fault by making new benefit cost estimates for each of the sixteen state no-fault auto insurance plans, such estimates have to date only been developed for one state, Florida."[42] The Florida study, undertaken by Professor Little, shows that as the level of premiums declined, the level of benefits rose, yielding a 39% increase in the benefits premium ratio between 1971 and 1972 and a 56% increase in that ratio between 1971 and 1973. These results seem to indicate that the introduction of no-fault in Florida on January 1, 1972 significantly increased the efficiency of the auto insurance system.[43]

The DOT study warns that these data "have to be viewed with caution"[44], principally because the Florida no-fault law mandated a 15% rate reduction in insurance premiums. This mandated reduction would have served to decrease artificially the premium paid per

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41 Report to the Governor, supra. at 11.

42 DOT Study, supra. at 44.

43 Id.

44 Id.

registered vehicle data compiled by Professor Little. Hence the calculated reduction may have been artificially inflated during the first two years of no-fault.

The DOT Study states that "the only reasonable conclusion that can be drawn seems to be that the documented shift from third party tort liability claims to first party, no-fault claims in the auto insurance systems of the no-fault states strongly suggest that these systems are, at least to some extent, realizing the administrative cost-savings theoretically inherent in such a shift. Unfortunately, the data has not been developed that could support or refute the existence of such theoretical cost efficiencies."[45]

E. Reducing Litigation and Court Congestion

Court congestion is a major problem in many jurisdictions. In California, for example, more than 80,000 lawsuits for personal injury, death or property damage were filed in 1976, about 5,000 more than in the previous year.[46] Approximately two-thirds of these filings were for auto-related cases, a category that in some years has grown only about twice the rate of population growth.[47] If auto no-fault legislation could substantially reduce the filings for auto accident cases, this would obviously impact favorably on court congestion.

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45 Id. at 46.

46 Kline, text of article prepared for January 1978 publication in the Calif. B. J.

47 Id.

Michigan reports that the reduction of court congestion was an objective "clearly being realized" by its no-fault law.[48] In a study of automobile negligence cases filed in circuit courts in Michigan in 1971 through June 1976, Michigan reports a decrease in cases filed of nearly 20% from 1975. Since the circuit data include many cases based on accidents filed before the effective data of the no-fault law, the reduction in cases is even more impressive.

Similar studies in other jurisdictions also found that court congestion was reduced after the enactment of automobile no-fault. In Massachusetts, for example, an analysis of motor vehicle tort cases in the five superior courts and eight district courts within fourteen counties showed that new bodily injury cases had actually declined from their pre no-fault level in the Superior courts and by 89% in the district courts.[49]

Similarly, in Florida "Little's extrapolation of the pre no-fault level of tort suits to the post no-fault period (adjusted for the annual accident rate) led him to conclude that motor vehicle torts under no-fault were some 15 percent less in the aggregate for the period 1971-1974 than they would have been in the absence of no-fault.[50] New Jersey, which has a $200 minimum tort liability threshold, shows "a steady decline since 1970 in the percentage of all civil cases which are auto negligence cases, but also an

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48 Report to the Governor, supra. at 10.

49 Bovbjerg, "The Impact of No-Fault Insurance on Massachusetts Courts", 11 New Eng. L. Rev. 325, 338-340 (1976).

50 DOT Study, supra. at 52.

acceleration of this decline since no-fault took effect in 1973".[51]

In Delaware, on the other hand, "tort litigation is continuing substantially unabated by the no-fault legislation."[52] Delaware, however, is an "add-on" state and was not included in the federal study because its no-fault law did not meet the criteria of no-fault set forth by that study.[53]

The federal study concluded that Massachusetts, Florida, New Jersey and Michigan "consistently show a decline in the level of motor vehicle tort litigation after the introduction of the tort restrictions that are part of the no-fault plans of these states".[54] This does not mean, though, that a comparable decline occurred with respect to the amount of court resources consumed by automobile accident litigation. Since the tort restrictions imposed in these states remove the less serious tort cases from the judiciary, those more serious left to the courts may still consume a disproportionate amount of court resources.[55] Moreover, the data available cannot answer "which type of tort restrictions best reduce the level of motor vehicle tort litigation",[56] whether they be monetary thresholds

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51 Id. at 54-55.

52 O'Connell, "Survey", supra. at 44.

53 A chart setting forth the basic features of various state no-fault plans is attached hereto as Exhibit A.

54 DOT Study, supra. at 57.

55 O'Connell, "Survey", supra. at 26, n. 13.

56 DOT Study, supra. at 58.

like Massachusetts or verbal thresholds as in Michigan. Nonetheless, the federal study concludes that "no-fault has demonstrated itself as an effective reducer of motor vehicle tort litigation in states as diverse as /Massachusetts, Florida, New Jersey and Michigan/.[57]

F. Reducing or Stabilizing Insurance Rates

Much has been written about the impact of automobile no-fault legislation on insurance premium rates. Unfortunately, the studies are in conflict or inconclusive.

Comparative studies are complicated by inflation and varying accident rates between pre no-fault and post no-fault time periods. The essential problem, however, is "trying to compare no-fault rates with rates for fault-based coverages which would have been imposed if no-fault had not been enacted".[58] This is further compounded by the initial mandatory reduction in auto insurance rates imposed in several states when no-fault was enacted, including Massachusetts, Florida and New York.

Despite the statistical difficulties, conflicting studies have been issued. The National Association of Independent Insurers, an insurance trade organization made up of trade organizations generally opposed to no-fault, including Allstate, concluded that in Florida, Connecticut, New Jersey and Nevada, "the cost of no-fault coverages was higher than under /fault-based coverages/".[59] Similarly, the

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57 Id.

58 O'Connell, "Survey", supra. at 36.

59 Henderson, "Report on the Status and Effect of No-Fault Insurance Schemes for Automobile Accidents in the U.S.", submitted to the Special Committee on the Uniform Motor Vehicle Reparations Act of the National Conference of Commissioners on Uniform State Laws, June 26, 1976, at 79.

New York State Insurance Department announced that the cost of automobile insurance had more than doubled since 1975 for many state residents, with some department officials and insurance executives citing abuses in the state's no-fault system as a major factor.[60]

The federal study found that "from an empirical standpoint, there was no satisfactory approach to assessing the relative cost of no-fault vis-a-vis the insured tort liability system".[61] Nonetheless, the federal study did find that, when adjusted for inflation, rates in Michigan /the state whose plan is closest to a pure no-fault/ either held steady or dropped".[62]

Professor Roger Henderson of the University of Nebraska College of Law, reported to the Commissioners on Uniform State Laws, a quasi-official body with members appointed by governors of the various states, that the figures from various sources[63]

> will not provide clear-cut answers to the question of the impact of no-fault on costs, but perhaps by a dogged and tedious effort one can sense, if not actually demonstrate, that the better designed no-fault automobile insurance plans do in fact lower bodily injury insurance rates. At the very least though, the data clearly do not support the claims of those that charge that no-fault has caused higher rates.

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60 N. Y. Times, July 25, 1976, Section 1 at 1, column 1.

61 DOT Study, supra. at 66.

62 Id. at 69.

63 Henderson, supra. at 62.

In sum, there is no conclusive evidence that no-fault automobile insurance either lowers or raises insurance premiums, save from the "viewpoint of minimizing friction costs and compensating the out-of-pocket economic losses of auto accidents" in a superior way to insured tort liability. According to the federal study, "the test that no-fault advocates call for is basically one of overall cost efficiency as an economic loss reparations system. It is on this criteria that it should be measured. It is on this criteria that it is demonstrably superior /to insure tort liability/".[64]

IV. Conclusion

The concept of automobile no-fault -- which has been enacted in various forms in twenty-six states -- means different things to different people. Though still relatively new (Massachusetts was the first state to enact a form of auto no-fault in 1971), the empirical evidence suggests that auto no-fault offers several distinct advantages to automobile accident victims over tort based reparations. More benefits to larger numbers of victims with greater efficiency is the principal advantage.

The impact of automobile no-fault depends, of course, on the particular features of the legislation and the jurisdiction in which it applies. California has considered no-fault in the past and rejected it. But the experience of other states -- particularly Michigan -- the pendency of federal legislation and support from the federal administration for auto no-fault, the clamor for tort reform in California, and other factors, make the concept once again ripe for reconsideration.

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64 DOT Study, supra. at 73.

A P P E N D I X

(Summary of State No-Fault Laws)

State No-Fault Laws

	Effective Date	Purchase of First Party Benefits	Minimum Tort Liability Threshold*	Maximum First Party (No-Fault) Benefits				Property Damage
				Medical	Income Loss	Replacement Services	Survivors/Funeral Benefits	
ARKANSAS (Ark. Stat. Ann. §66-4014)	July 1, 1974	Optional	None	$2,000 if incurred within two years.	70% of lost income up to $140/wk., beginning 8 days after accident, for up to 52 wks.	Up to $70/wk. beginning 8 days after accident, for up to 52 wks.	$5,000	Under tort system.
COLORADO (Colo. Rev. Stat. §10-4-701)	April 1, 1974	Mandatory	$500	$25,000 if incurred within 3 years (additional $25,000 for rehabilitation)	Up to $125/wk. for up to 52 wks.	Up to $15/day for up to 52 wks.	$1,000	Under tort system.
CONNECTICUT (Conn. Gen Stat. Rev. §38-319)	January 1, 1973	Mandatory	$400	Limited only by total benefit limit.	85% of actual loss for income loss and replacement services up to $200/wk.		85% of actual loss for income loss & replacement services up to $200/wk. Funeral benefit: $2,000.	Under tort system.
				$5,000 overall maximum on first-party benefits				
DELAWARE (Del. Code Ann. tit. 21, §2118)	January 1, 1972	Mandatory	None, but amt. of no-fault benefits received can't be used as evidence in suits for general damages.	Limited only by total benefit limit, but must be incurred within two years.	100% of loss; no weekly maximum.	Limited only by total benefits limit.	Funeral benefit: $2,000.	Under tort system.
				$10,000 per person, $20,000 per accident overall maximum on first party benefits.				
FLORIDA (Fla. Stat. §627.730)	January 1, 1972 for original law. Present law effective October 1, 1976	Mandatory	No dollar threshold.[1]	Limited only by total benefits limit.	85% of loss; no weekly maximum.	Limited only by total benefits limit.	Funeral benefit: $1,000.	Under tort system.
				$5,000 overall maximum on first-party benefits				
GEORGIA (Ga. Code Ann. §56-3041b)	March 1, 1975	Mandatory	$500	$2,500	85% of lost income up to $200/wk.	$20/day	Maximum wage loss and replacement services amounts. Funeral benefit: $1,000.	Under tort system.
				$5,000 overall maximum on first party benefits				
HAWAII (Hawaii Rev. Stat. §294-1)	September 1, 1974	Mandatory	Floating threshold set annually by insurance commissioner.	Limited only by total benefits limit.[2]	Up to $800/month for income loss and replacement services.[2]		Up to $800/month for income loss and replacement services. Funeral benefit: $1,500.	Under tort system.
				$15,000 overall maximum on first party benefits				

	Effective Date	Purchase of First Party Benefits	Minimum Tort Liability Threshold*	Maximum First Party (No-Fault) Benefits				Property Damage
				Medical	Income Loss	Replacement Services	Survivors/Funeral Benefits	
ANSAS (an. Stat. Ann. §40-3101)	January 1, 1974	Mandatory	$500	$2,000 (additional $2,000 for rehabilitation).	85% of lost income up to $650/month for 1 yr.	$12/day for one year.	Up to $650/month for lost income and $12/day for replacement services, less disability payments received, for up to 1 year. Funeral benefit: $1,000.	Under tort system.
ENTUCKY (y. Rev. Stat. Ann. §304.39-010)	July 1, 1975	3	$1,000	Limited only by total benefits limit.	85% of lost income (more if tax advantage is less than 15%) up to $200/wk.	Up to $200/wk.	Up to $200/wk. each for survivors' economic loss and survivors' replacement services loss. Funeral benefit: $1,000.	Under tort system.
				$10,000 overall maximum on first party benefits				
ARYLAND (d. Code Ann. art. 48A, §538)	January 1, 1973	Mandatory	None	Limited only by total benefits limit, but must be incurred within 3 years.	100% of loss; no weekly maximum.	Limited only by total benefits limit; only for services usually performed by non-income-earners.	Funeral benefit: limited only by total benefits limit.	Under tort system.
				$2,500 overall maximum on first party benefits for expenses incurred within three years of accident.				
ASSACHUSETTS (ass. Ann. Laws ch. 90, §§34A, 34M & ch. 231, §6D)	January 1, 1971	Mandatory	$500	Limited only by total benefits limit, if incurred within 2 yrs.	Up to 75% of actual loss.	Limited only by total benefits limit; payments made to non-family members.	Funeral benefit: limited only by total benefits limit.	Under tort system after Jan. 1, 1977; prior to then, no tort liability for vehicle damage.
				$2,000 overall maximum on first party benefits				
ICHIGAN (ich. Comp. Laws Ann. §500.3101)	October 1, 1973	Mandatory	No dollar threshold.[4]	Unlimited.	85% of lost income up to $1285/30 day period for up to 3 years; maximum amount adjusted annually for cost of living.	$20/day for 3 years.	Up to $1,000/30 day period for lost income and $20/day for replacement services, for up to 3 years. Funeral benefit: $1,000.	No tort liability for vehicle damage.
INNESOTA (inn. Stat. §65B.41)	January 1, 1975	Mandatory	$2,000	$20,000	85% of lost income up to $200/week.	$15/day, beginning 8 days after accident.	Up to $200/wk. each for income loss and replacement services. Funeral benefit: $1,250.	Under tort system.
				$10,000 maximum for first party benefits other than medical				

	Effective Date	Purchase of First Party Benefits	Minimum Tort Liability Threshold*	Maximum First Party (No-Fault) Benefits				Property Damage
				Medical	Income Loss	Replacement Services	Survivors/Funeral Benefits	
NEVADA (Nev. Rev. Stat. §698.010)	February 1, 1974	Mandatory	$750	Limited only by total benefits limit.	85% of lost income up to $175/week.	Up to $18/day for up to 104/weeks.	At least $5,000, but not more than 1 year's maximum disability benefits. Funeral benefits: $1,000.	Under tort system.
				$10,000 overall maximum on first party benefits				
NEW JERSEY (N.J. Stat. Ann. §39:6A-1)	January 1, 1973	Mandatory	$200	Unlimited.	100% of lost income up to $100/wk. for 1 year.	Up to $12/day up to a maximum of $4380/person.	100% of lost income up to $100/wk. and $12/day for replacement services. Up to difference between aggregate amount payable and amount received by victim. Funeral benefit: $1,000.	Under tort system.
NEW YORK (N.Y. Ins. Law §670)	February 1, 1974	Mandatory	$500	Limited only by total benefits limit.	80% of lost income up to $1000/month for 3 yrs.	$25/day for 1 yr.	NONE.	Under tort system.
				$50,000 overall maximum on first party benefits				
NORTH DAKOTA (N.D. Cent. Code Ann. §26-41-01)	January 1, 1976	Mandatory	$1,000	Limited only by total benefits limit.	85% of lost income up to $150/week.	$15/day.	85% of lost income up to $150/wk. and $15/day for replacement services. Funeral benefit: $1,000.	Under tort system.
				$15,000 overall maximum on first party benefits				
OREGON (Ore. Rev. Stat. §743.800)	January 1, 1972 (Jan. 1, 1974 for current first party benefits.	Mandatory	None	$5,000, if incurred within 1 yr.	70% of lost income up to $750/month for up to 52 weeks, only if victim is disabled at least 14 days.	Up to $18/day for up to 52 weeks, only if victim is disabled at least 14 days.	Funeral benefit: $1,000.	Under tort system.
PENNSYLVANIA (Pa. Stat. Ann. tit. 40, §1009.101)	July 19, 1975	Mandatory	$750	Unlimited.	Up to $15,000.[b]	Up to $25/day for 1 year.	Income loss and replacement services benefits up to $5,000. Funeral benefit: $1,500	Under tort system.

	Effective Date	Purchase of First Party Benefits	Minimum Tort Liability Threshold*	Maximum First Party (No-Fault) Benefits				Property Damage
				Medical	Income Loss	Replacement Services	Survivors/Funeral Benefits	
SOUTH CAROLINA (S.C. Code Ann. §46-750.101)	October 1, 1974	Mandatory	None	Limited only by total benefits limit if incurred within 3 yrs	100% of lost income. No weekly limit.	Limited only by total benefits limit.	Funeral benefit: limited only by total benefits limit.	Under tort system.
				$1,000 overall maximum on first party benefits				
SOUTH DAKOTA (S.D. Comp Laws Ann. §58-23-6)	January 1, 1972	Optional	None	$2,000 if incurred within 2 yrs.	$60/wk. for up to 52 weeks, only if victim is disabled at least 14 days.	$30/wk. for up to 52 weeks, only if victim is disabled at least 14 days. Benefits to non-wage-earning named insureds only.	$10,000 death benefit if death occurs within 90 days of accident.	Under tort system.
TEXAS (Tex. Ins. Code Ann. art. 5.06-3)	August 26, 1973	Optional	None	Limited only by total benefits limit if incurred within 3 yrs.	100% of lost income; no weekly limit.	Limited only by total benefits limit. Payable only to non-wage-earners.	Limited only by total benefits limit.	Under tort system.
				$2,500 overall maximum on first party benefits				
UTAH (Utah Code Ann. §31-41-1)	January 1, 1974	Mandatory	$500	$2,000	85% of lost income up to $150/wk. for up to 52 weeks. 3-day waiting period which does not apply if disability lasts longer than 14 days.	$12/day for up to 365 days. 3-day waiting period which does not apply if disability lasts longer than 14 days.	$2,000 death benefit. Funeral benefit: $1,000.	Under tort system.
VIRGINIA (Va. Code Ann. §38.1-380.1)	July 1, 1972	Optional	None	$2,000 if incurred within 1 yr.	100% of lost income up to $100/week for up to 52 weeks.	None.	Funeral benefit: included in medical benefit.	Under tort system.
FEDERAL STANDARDS (S. 1381, 95th Session of Congress)		Mandatory	6	$100,000 (or $250,000 if disability lasts over 2 years)	7	7	$1000(both funeral & death benefit)	Under tort system.

*Refers to minimum amount of medical expenses necessary before victim can sue for general damages ("pain and suffering"); lawsuits allowed in all states for injuries resulting in death and permanent disability; some states allow lawsuits for one or more of the following: serious and permanent disfigurement; certain temporary disabilities; loss of body member; loss of certian bodily functions; certain fractures; or economic losses (other than medical) which exceed stated limits.

1. Florida-Victim cannot sue for general damages unless injury results in one of the following: death, loss of body member; permanent loss of bodily function; permanent injury other than scarring or disfigurement; significant permanent scarring or disfigurement; serious non-permanent injury that has a material bearing on the victim's ability to resume his normal activity and life-style during all or substantially all of the 90-day period after the injury, if the effects of the injury are medically or scientifically demonstrable at the end of that period. Before 1976, Florida had a $1000 tort threshold.
2. Hawaii-Income loss not payable to public assistance recipients receiving free insurance.
3. Kentucky-Accident victim is not bound by tort restriction if 1) he has rejected the tort limitation in writing or 2) he is injuried by a driver who has rejected the tort limitation in writing. Rejection bars recovery of first-party benefits.
4. Michigan-Victim can't sue for general damages unless injuries result in death, serious impairment of bodily function or serious permanent disfigurement.
5. Pennsylvania-Maximum monthly income loss benefit is $1000 times the relationship of the average Penn. per capita income to the average U.S. per capita income; or 100% of income loss if income is disclosed prior to accident.
6. Federal Standards-Tort restrictions are the same as Michigan (#4 above), in addition to losses which exceed maximum first-party benefits.
7. Federal Standards-Monthly income benefit based on $1000 and replacement services based on $20/day; both figures are multiplied by the relationship of the average state per capita income to the average U.S. per capita income; or 100% of income loss if income is disclosed prior to accident; whichever is less. Maximum income benefit limited to 12 times monthly benefit; replacement services limited to 365 times daily benefit.

June, 1977
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D R A M S H O P

(Restaurant and Bar Owners' Liability)

DRAM SHOP

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ALCOHOL-RELATED ACCIDENT

(Our gratitude to the California Highway Patrol for use of these photographs and for their continued concern for the safety of our citizenry.)

INTRODUCTION

The law of torts deals with the allocation of losses and compensation for injuries sustained by one person as the result of conduct on another. There are many different individual interests involved and it is inevitable that these interests shall come into conflict. Potential resolutions of the conflicting interests can take many forms - from use of club and sword to intergallactic starship battles. Our society has adopted a more civilized and down to earth resolution through the development of a systematic administration of law and reason. It is the Legislature which has been charged with this function of enacting law.

The staff of the Joint Committee on Tort Liability endeavours to assist the Legislature in the process of enacting legislation to resolve the competing interest of citizens in need of protection against the interest of other citizens' claim to untrammelled freedom.

Specifically, this report addresses the interest of every citizen to be free from bodily harm arising out of the significant and ever-increasing number of alcohol-related automobile accidents versus the competing interest in the freedom of the furnishing and use of alcoholic beverages.

I

STATEMENT OF THE PROBLEM

Restaurant and bar owners are faced with high liability insurance costs.[1]

At the same time California Department of Highway Patrol reports the largest primary collision factor for fatal accidents is alcohol.[2] The Department of Highway Patrol statistics show that from 1971 to 1976 8,086 persons died as a result of alcohol related accidents and 161,263 were injured.[3]

II

EFFECT OF THE PROBLEM

The letter from Grand American Fare, supra, alleges the effects of the high cost of coverage can be summarized as follows:

A. Increasing prices to the consumer;

B. Going bare;

C. Going broke with resulting unemployment.

III

THE REASON FOR THE PROBLEM

The article on Liquor Liability alleges that the reason for the problem is twofold. First, it states that insurance carriers

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[1]"Liquor Liability," W. Foodservice (Feb. 1977) (Exhibit A); letter from Grand American Fare to Senator Alfred H. Song (May 25, 1977) (on file with the Joint Committee on Tort Liability)(Exhibit B).

[2]California Department of Highway Patrol, "Report of Fatal and Injury Motor Vehicle Accidents (1976)." (Exhibit C - Summary)

[3]California Department of Highway Patrol, "Reports of Fatal and Injury Motor Vehicle Accidents (1971-76)." (Exhibit C - Summary)

are concerned with "long tails," that is, the time lag between the occurrence and when suit is filed. Specifically, even though the statute of limitations is short, 1 year, plaintiff has the ability to name doe defendants and amend the complaint years later.[4] The article concludes that coupled with the high cost of defending suits, long tails mean high cost to the carriers.

The second reason for the problem given by Western Foodservice's article is stock market losses. The article states:

> "The cost of settling liquor liability suits has undoubtedly hurt some insurance companies in the last few years. There may be another explanation, however, for the dramatic rise in insurance premiums that has struck not only restaurants but other policy holders including doctors and automobile operators. At a recent SCRA meeting convened to discuss the liquor liability problem, general manager Bob Riley cited an Underwriter's Report that in 1974 and 1975 the liability insurance industry suffered substantial deficits of which over 50% were stock market losses. Policyholders may be paying higher premiums to restore insurance reserves seriously depleted through failed management and investments." "Liquor Liability," supra, n.1.

IV

THE EVIDENCE

The Evidence section is divided into four topics: 1) existing dram shop legislation and its historical basis; 2) judicial interpretation and extension of dram shop liability; 3) new developments in dram shop liability; and, 4) the factual effect of imposition of dram shop liability.

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[4]This is limited only by the requirement of good faith on plaintiff's part to discover and amend to name potential defendants.

The background given in these areas provides evidentiary support to the recommendations which follow in Section V. The staff of the Committee hopes such information assists the legislature in resolving the conflicting concerns for the safety of citizens and the freedom to use and sell alcohol.

A. Historical Basis of Existing Law and Its Rationale.

1. Dram Shop Legislation

Historically, dram shop acts refer to statutes which impose civil liability on commercial servers of alcoholic beverages for the injuries caused by their drunken patrons. While criminal statutes making such serving a crime are not dram shop acts in a strict sense, some courts have been willing to borrow such statutes to impose civil liability.

California's first statute, enacted in 1889, was an act to prevent the sale of intoxicating liquors to persons addicted to the inordinate use of intoxicating liquors and prohibiting the furnishing of alcohol to such persons by one who has received notice that the person named in the notice is so addicted (Cal. Stats. [1889] ch. 241 §1 at 352). Violation of the statute resulted in criminal punishment by imprisonment or fine or both (Id. at 352). The passage of the legislation was typical of that passed in many states in response to the political pressure of the temperance movement.[5]

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[5]J. Mosher, J.D., "Dram Shop Liability and the Prevention of Alcohol Related Problems," (June 1978) (citing among others, D. Colvin, Prohibition in the United States (G.H. Doran, Co. 1926) at 25, 97, 102) (on file with the Joint Committee on Tort Liability).

The provision prohibiting the sale to habitual drunkards reflected the belief of many that alcoholic beverages were an addictive evil which sapped a person's strength and will if used regularly. (J. Mosher, "Dram Shop Liability . . .," supra, at 2.) Moreover, habitual drunkards were considered easily recognizable (id. at 2).

In 1935 as part of the enactment of the comprehensive Alcoholic Beverage Control Act, Chapter 241 was amended, deleting the notice requirement and supplying the basic statutory language of the current provision of Business and Professions Code Section 25602 (Cal. Stats. 1935, Ch. 330, Section 62 at 1151). The punishment for violation remained the same as the original provision. However, it was not until 1937 that Section 62 was amended to include a prohibition against the furnishing of any alcoholic beverage to an obviously intoxicated person. The penalty for violation of the statute again remained criminal and was punishable by imprisonment, fine or both. The extension of the dram shop rule to an obviously intoxicated person reflected a change from society's temperance orientation to society's perception of the dangers of the use of alcoholic beverages (J. Mosher, supra at 2). It was also a reflection of the difficulty of identifying who was and who was not a common drunkard (See, Op. Atty. Gen. No. 1-10191, 1935).

Dram shop legislation is currently embraced in Business and Professions Code Section 25602. On its face, it imposes only criminal liability against any person furnishing

alcoholic beverages to any habitual or common drunkard or to any obviously intoxicated person. The questions now before the legislature and addressed in this report are: 1) the extent to which civil liability in connection with the furnishing of alcoholic beverages should be imposed, and, 2) whether societal changes today warrant a change from the 1935 standard of obviously intoxicated.

2. Case Authority.

a. Pre-1971 case law:

Prior to 1971, decisions in California held that one who furnished alcoholic beverages to an obviously intoxicated person in violation of Business and Professions Code Section 25602 was not liable in a civil suit for damages resulting from the latter's intoxication.[6] The explanation for the holdings was that it is the voluntary "consumption" and not the sale or gift of the intoxicating liquor which is the proximate cause of the injury from its use (Cole v. Rush, supra at 356; Hitson v. Dwyer, supra at 809).

b. "On Top of Mount Baldy" - the Vesely case and its expansion:

1. Injured Third Person v. Vendor of Alcoholic Beverages.

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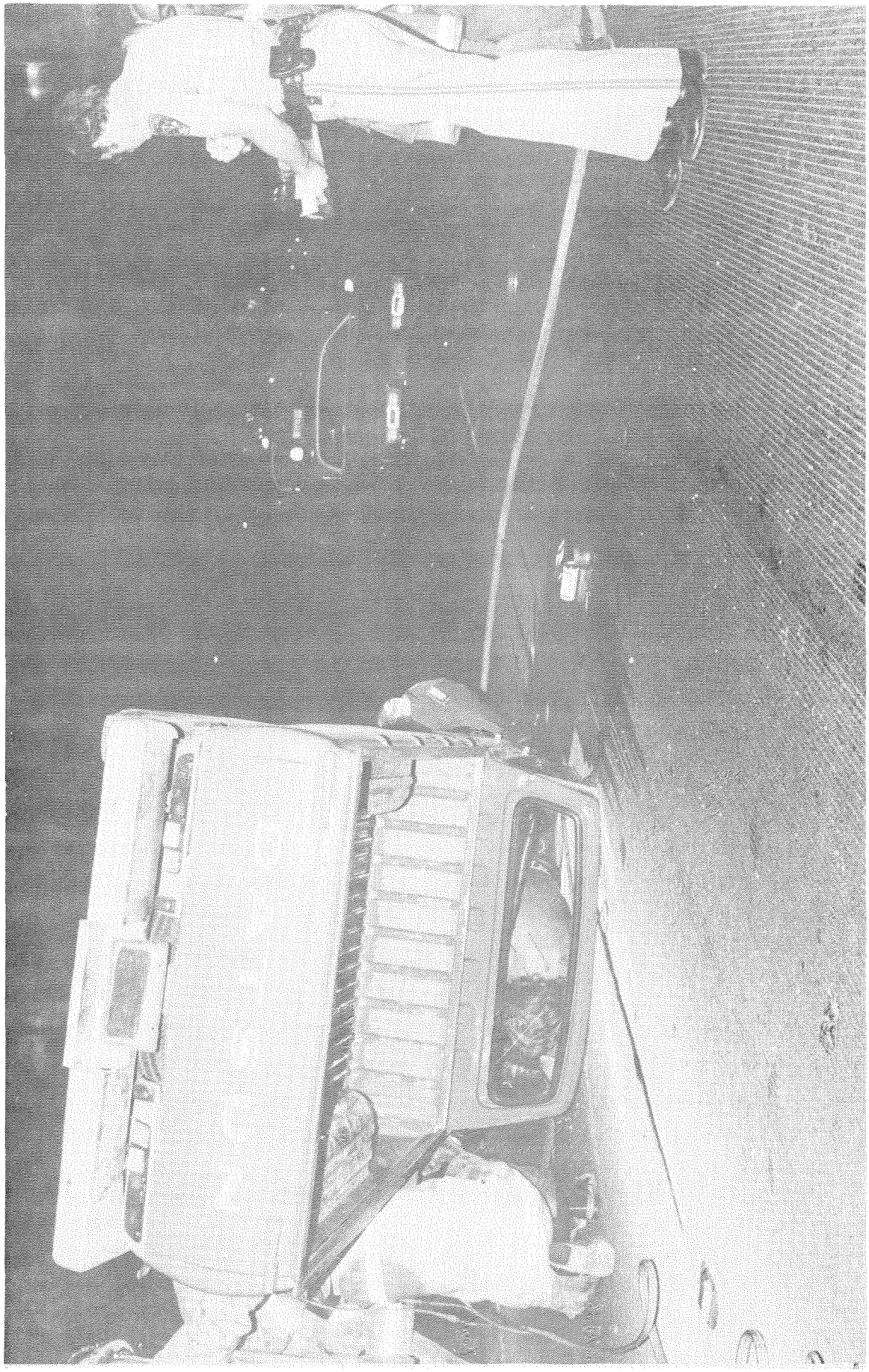
[6]Cole v. Rush (1955), 45 Cal. 2d 345; Fleckner v. Dionne (1949), 94 Cal. App. 2d 246; Hitson v. Dwyer (1943), 61 Cal. App. 2d 803; See, Lammers v. Pacific Electric Railway (1921), 186 Cal. 379 (addressing the issue in dictum at 384).

PLATE 2



FATALITY RESULTING FROM ALCOHOL-RELATED ACCIDENT

In Vesely v. Sager (1971) 5 Cal. 3d 153 the Court abandoned the doctrine of Cole v. Rush holding instead that the furnishing of an alcoholic beverage to an intoxicated person may be the proximate cause of injuries inflicted by that individual on a third person (id. at 164). The facts, as reported in Vesely, indicate that the plaintiff was sideswiped by a vehicle driven by James O'Connell who had been served large amounts of alcoholic beverages by defendant from about 10:00 p.m. on April 8, 1968 until approximately 5:15 a.m. on April 9, 1968 (id. at 157). Defendant knew that O'Connell was becoming excessively intoxicated and that O'Connell was incapable of exercising the same degree of volitional control over his consumption of intoxicants (id. at 157-58). Defendant also knew that the only route leaving the Buckhorn Lodge on top of Mr. Baldy was a very steep, winding, and narrow mountain road over which O'Connell was going to drive (id. at 158).

On appeal from the trial court's Judgment of Dismissal after the sustaining of defendant's demurrer for failure to state a cause of action, the Supreme Court applied traditional concepts of proximate cause reasoning that even though consumption is an intervening cause, it is a foreseeable one and thus does not necessarily break the chain of causation between furnishing the intoxicant and the resulting injury (see, id. at 164).

Furthermore, in establishing the existence of a duty on the part of a vendor defendant, the court relied on Business and Professions Code Section 25602 reasoning that that section was adopted for the purpose of protecting members of the general public from injuries to person and damages to property

resulting from the excessive use of intoxicating liquor (id. at 165). Finally, by virtue of the well-established principles of Evidence Code Section 669, the violation of Section 25602 was negligence per se raising a presumption of negligence, shifting the burden of proof to the vendor defendant.

On remand to the trial court one issue was whether defendant bar owner's liability policy excluded coverage for the furnishing of alcoholic beverages. As a result, the defense was tendered back to Mr. Sager. He stipulated to a judgment in 1972 in the amount of $35,000 with an agreement not to execute against him personally.[7] In 1974 plaintiff then settled with the insurance carrier in the amount of $20,000 although the carrier continued to dispute coverage.[8] Thus, Vesely overruled the longstanding doctrine of Cole v. Rush and held that the sale of alcohol to an obviously intoxicated person can be the proximate cause of injuries to a third person.

c. Injured Patron v. Vendor of Alcoholic Beverage.

1. Defenses barring the action. The court in Vesely left open the question of whether the person who is served alcoholic beverages in violation of the statute may recover for injuries suffered as a result of that violation (id. at 157). The appellate courts avoided answering the question by application of common law notions of contributory negligence of the patron

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[7]Memorandum of phone conversation with Mr. Ronald R. McQuoid (June 27, 1978), Exhibit D, original on file at the Joint Committee on Tort Liability.

[8]Vesely v. Sager, San Bernardino County Superior Court, Ontario Division, No. CW 4359.

(see, Carlisle v. Kanawyer (1972) 24 Cal. App. 3d 587) or by defeating plaintiff's proof of duty under Business and Professions Code Section 25602 by finding plaintiff in pari delicto (in equal fault).[9] In the Carlisle case the appellate court sustained the dismissal pursuant to defendant's demurrer on the grounds that plaintiff's allegation that plaintiff's decedent choked to death in his own vomit in a bar constituted contributory negligence on the face of the complaint.

2. Sidestepping the bar. The Carlisle case was a wrongful death action and was brought by the widow and young children of the decedent, who the court noted was alleged to be "a faithful and dutiful husband and father respectively" (Carlisle v. Kanawyer, supra at 590). It was further alleged that decedent was well known to defendant bar owners as "a habitual drunkard or an alcoholic and has lost the willpower to resist the temptation when liquor was offered to him" (id. at 590). Plaintiff continued the allegation stating that defendant nevertheless served liquor to defendant in violation of the law "until and after he became intoxicated and unable to care for himself in any manner," that he became violantly ill and died in the bar when he strangled upon inhaling his own vomit (id. at 590). Under these extreme facts the court sidestepped the harsh bar of contributory negligence and found a cause of action to be stated by application of the principle that when a defendant's

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[9]See, Rose v. International Brotherhood of Electrical Workers Local No. 11 (1976) 58 Cal. App. 3d 276.

negligence is the cause of plaintiff's need for aid, there is a special duty for defendant to take reasonable steps to prevent further harm to plaintiff (id. at 592).

Although the court had to manipulate legal principles to allow recovery in this case, the result was consistent with the subsequent decision in Li v. Yellow Cab (1974) 13 Cal. 3d 804 where disapproval of the harshness of contributory negligence was expressed (id. at 810-12).

3. Confronting the issue of duty. But more than just the legal disapproval of contributory negligence was involved in the manipulation of these principles as pointed out by Justice Friedman in Kindt v. Kauffman (1976) 57 Cal. App. 3d 845. In a thoughtful dissent he commented at 868-69:

> "In cases like this -- where a finding of the plaintiff's negligence is a frequent or expected eventuality -- the comparative negligence doctrine now permits the jury to reduce the plaintiff's recovery in proportion to his responsibility. The prospect of a plaintiff's recovery for his intoxication-caused injuries encounters expectable judicial-moral disapproval of the drunken plaintiff behind a veil of legal doctrine. In the past, when contributory negligence supplied a complete defense, appellate judges could privately satisfy their moral predilections by publicly charging the drunken plaintiff with contributory negligence "as a matter of law." The comparative negligence rule now blocks this juridical escape route."

However, even after the advent of comparative negligence, judges were able to use other legal doctrines such as willful misconduct (Kindt v. Kauffman, supra and assumption of the risk (Cooper v. National Railroad Passenger Corp. (1975) 45 Cal. App. 3d 389) to allow or defeat recovery according to their innate sense of justice.

The Kindt court recognized that ultimately the question of whether there should be a civil cause of action in favor of an injured intoxicated patron against the bar owners is a duty question. The existence of a duty is based on foreseeability, but more importantly, on policy factors (Kindt v. Kauffman, supra at 854). The court stated that "these factors are subsumed within the categories of (1) administrative, (2) moral, and (3) socio-economic . . ." (id. at 854).

In analyzing the administrative factor, the court underscores the speculative nature of the standard of obviously intoxicated provided by Business and Professions Code Section 25602 and the factual problem of whether the last drink to the already intoxicated person was a cause in-fact of the resulting harm:

> "We are troubled by the efficacy of a decision-making process that would allow the sought-after cause of action. . ."
>
> * * *
>
> "To be obviously intoxicated one must first be in fact intoxicated. By the time the tavern owner (or his agent) violates the statute, the patron has already put himself into such a state as to be dangerous to himself and others. If he is then served a single drink, following which he leaves the premises and injures himself, who is to say that the tavern owner's statutory violation by service of the one drink contributed as a proximate cause to the injury? Or if before the injury he visits a few more taverns and consumes one drink at each of them, who is to say which of the drinks at which of the taverns was a proximate cause? The standard response is that it is a question of fact for the jury; and so it is. But the speculation to be indulged in by the fact finder, whether the violation involves a single drink or a dozen, one tavern or five, is considerable (id. at 855)."

In analyzing the moral factor the court again finds it weighs against the finding of a cause of action in favor of the intoxicated patron, stating at 855-56:

> "The inestimable gift of reason and self-control cries out for preservation in every person, and the duty of its preservation devolves upon each member of the public. When the restraint of reason and the ability to care for one's self are perverted by a conscious, self-indulgent act of voluntary intoxication which temporarily casts off those powers, no societal or personal wrong, nor violation of public or social policy is accomplished or violated if the actor is alone held answerable for his injury. '[T]he voluntary, independent, uncoerced, uninvited self-indulgence of him who knowing the difference between right and wrong and the injurious effects apt to follow' (Collier v. Stamatis (1945) 63 Ariz. 285, 162 P.2d 125, 128) nonetheless consumes alcohol arouses no ready sympathy; and when it is repeated so as to trigger a violation of Business and Professions Code Section 25602, it merits no reward."
>
> * * *
>
> "Governmantal paternalism protecting people from their own conscious folly fosters individual irresponsibility and is normally to be discouraged. (Citation omitted) To go yet another step and allow monetary recovery to one who knowingly becomes intoxicated and thereby injures himself is in our view morally indefensible."

In analyzing the socio-economic factor the court states:

> "But the cases have been roundly criticized on the grounds that no one should be rewarded with damages for his own voluntary participation in a wrong, particularly where, as is usually the case, he himself commits a crime, that the state is fully able to protect itself by a criminal prosecution; and that the parties, if they give any thought to the law at all, which is quite improbable, are quite as likely to be encouraged by the hope that if they get hurt they can still win in court." (id. at 857)

And then, despite the court's recognition that there are "hundreds of thousands of patrons" who use the on-sale alcohol dispensing business facilities daily, "a large percentage of who drive automobiles after consumption of alcohol" and who are largely responsible for the devastating highway carnage from automobile accidents, the court nevertheless concludes at 858-59:

> "But it simply does not follow that the creation of a rule of civil liability in favor of the patron would have any salutary effect. All that would occur would be that a rash of lawsuits would be filed by or in behalf of patrons of tavern owners, ranging from the patron who falls off his stool (Hitson v. Dwyer, supra) to the heirs of the patron who kills himself in his own shower at home, hours after his revelries (to say nothing of the inevitable plaintiff who will claim damages because his wife divorced him when he came home drunk and beat her). These lawsuits will bring about uniform substantial upward adjustments in liability insurance premiums. (footnote 11: Recent newspaper accounts declare that liability insurance carriers are imposing vastly increased premium rates on California tavern owners as a consequence of the third-party claims emanating from Vesely v. Sager. The same accounts reveal fears that some tavern owners may be forced out of business: Alternatively, that the price of drinks must be raised. Liability to injured customers as well as third persons would add to the reported economic burden. If the reported premium increases are based upon actual loss experience, that fact reveals widespread and lamentable violations of Section 25602. If the increases are not based upon loss experience, they are indicative of a need for inquiry into the rate-fixing practices of the insurance industry. The past years have witnessed the expansion and extension of tort liability doctrines without corresponding attention to the reparations system. Commerce and industry have experienced increased liability insurance costs, which are ultimately borne by the consuming public. As the current medical malpractice predicament illustrates, insurance cost increases, justified or unjustified, ultimately result in politico-economic pressures which arouse legislative attention. The rate-

> fixing practices of the insurance industry, not ongoing social need, finally generate some legislative renovations. Judicial development of new or extended liability doctrines thus triggers forces far beyond judicial control. The courts must fit decisional law to changing times as best they may, leaving the executive and legislative branches to protect the business community and the public against unwarranted financial burdens.)

Thus, in balancing the socio-economic considerations of the highway carnage versus the economic burden to bar owners in the form of increased liability insurance premiums the court in Kindt v. Kauffman concluded that the burden outweighed the benefit and found "the scales tipped heavily against the allowance of recovery" (id. at 859).

This conclusion is supported by the Annual Reports of the California Highway Patrol, "Report of Fatal and Injury Motor Vehicle Accidents" (1971-1976), Exhibit C (showing continued increase in automobile fatalities and deaths even after the imposition of civil liability in 1971).

Kindt was not the final word on the existence of a cause of action in favor of the intoxicated patron, however. In the case of Ewing v. Cloverleaf Bowl (1974) 20 Cal.3d 389 the court squarely addressed the question of a civil cause of action in favor of the intoxicated patron versus the vendor. Surprisingly, the opinion was devoid of the kind of in-depth policy analysis of the duty question as the Kindt court had done (see, Ewing v. Cloverleaf Bowl, id. at 389). Instead, in conclusionary language, the court finds that based on the rationale of Vesely that Business and Professions Code Section 25602 was enacted for the protection

of members of the general public and since the intoxicated patron was such a person, he therefore has a cause of action under that section (id. at 399, 400).

In the Ewing case there are extreme facts weighing in favor of the plaintiff. It is the surviving children who are bringing the action for the wrongful death of their father. The court sympathetically depicts the events leading up to the death of the patron by alcohol poisoning, stating the young patron was inexperienced, celebrating his 21st birthday and was egged on by his friends (id. at 403, 404). And, like the Vesely case, the facts on remand were seriously disputed, as Clark points out in his dissent (id. at 408,409). The ultimate disposition of the case on remand was a settlement in favor of the two minor children in the amount of $130,000 in April of 1978.[10]

Interestingly, the Ewing court approves of the use of legal principles such as willful misconduct and assumption of the risk on an ad hoc basis, specifically stating in footnote 10 at page 404 that they disapproved of any finding as a matter of law that a patron's conduct is willful misconduct and prefer the question to be decided by the trier of fact.

Thus, apparently, the Ewing court approves of the use of judges' innate sense of justice and equity in determining ad hoc the existence of a cause of action. It should

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[10]Ewing v. Cloverleaf Bowl, Alameda County Superior Court No. 415400; Memorandum of telephone conversation with Charles McCrory (June 23, 1978) (Exhibit E) on file at the Committee on Tort Liability.

be noted that, as the article "Liquor Liability" points out, it is this element of unpredictability which is alleged to contribute to the high cost of coverage (W. Foodservice, "Liquor Liability", supra).

d. Injured third party v. social host.

Both the Vesely and Ewing decisions left open the question of whether a noncommercial supplier of alcoholic beverage may be liable to third persons injured by reason of the intoxication of the consumer of those beverages. The Supreme Court in Coulter v. The Superior Court of San Mateo County (1978) 21 Cal.3d 144 answered that question in the affirmative reasoning that a person within the meaning of Section 25602 includes a social host, that the Legislature has failed to enact legislation immunizing the social host even though it had notice of the potential for liability and, that the number of alcohol-related accidents together with the social hosts ability to foresee the obvious risks warranted imposition of liability (id. at 151). Again, the court does not specifically analyze the policy factors which the Kindt decision regarded as integral to the existence of duty (see, Coulter v. Superior Court, supra). Instead, the Coulter court found the relevant factors to be:

> "[1] The degree of certainty that the plaintiff suffered injury;
> [2] The closeness of the connection between the defendant's conduct and the injury suffered;
> [3] The moral blame attached to the defendant's conduct;
> [4] The policy of preventing future harm;
> [5] The extent of the burden to the defendant and consequences to the community of imposing a

> duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." Rowland v. Christian, supra, at p. 113.

In analyzing the certainty and closeness factors the court concluded:

> "[1] Where such circumstances exist, as are herein & alleged, it is not difficult to discern a [2] close connection between defendant's conduct and the injury suffered by plaintiffs."

It is to be emphasized that the facts required to be presumed on appeal are not always undisputed at the trial level with the result that on remand plaintiff's recovery may be limited.[11] For example, in Bernhard v. Harrah's Club (1976) 16 Cal.3d 313 the case resulted in a defense verdict below because of plaintiff's inability to prove that Harrah's knew co-defendant Meyers was "obviously intoxicated and because of plaintiff's inability to prove Harrah's furnished the last drink since beer bottles as well as glasses from Harrah's and other establishments were found in co-defendant's automobile.[12] In analysis of the moral factor the court stated:

> "[3] While, traditionally, no moral blame attaches to the social host who entertains his guests by serving cocktails to them, it is not unfair to ascribe such blame to anyone who increases the obvious intoxication of a guest under conditions involving a reasonably foreseeable risk of harm to others. In this connection, we further note that it is small comfort to the widow whose husband has been killed in an accident involving an intoxicated driver to learn that the driver

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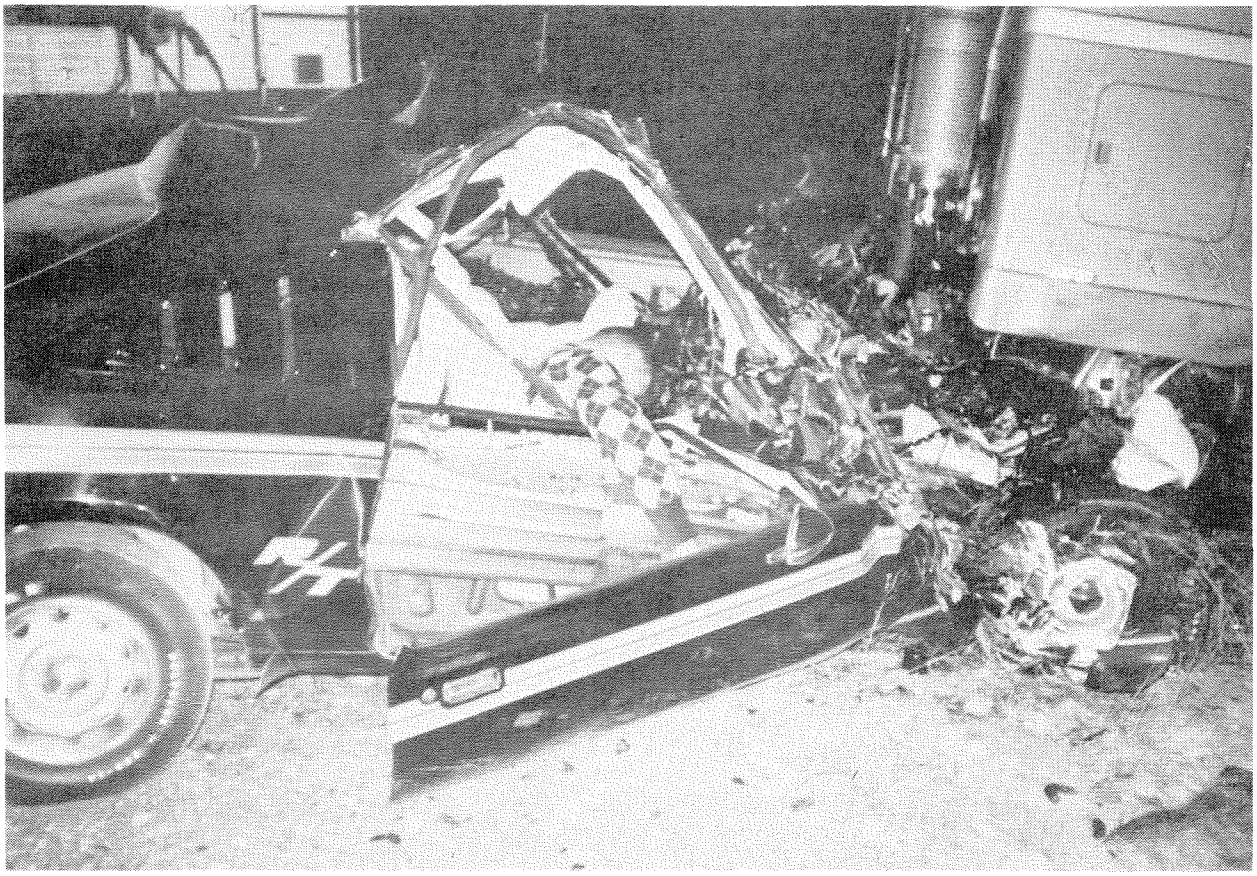
[11] See, Vesely v. Sager, San Bernardino County Superior Court, supra; memorandum of telephone conversation with Mr. Milton Hadley (June 27, 1978).

[12] Bernhard v. Harrah's Club; Sacramento County Superior Court, No. 224584; memorandum of telephone conversation with Thomas L. Wagner (June 28, 1978).

PLATE 3



FATALITY RESULTING FROM ALCOHOL-RELATED ACCIDENT

> received his drinks from a hospitable social host rather than by purchase at a bar. The danger of ultimate harm is as equally foreseeable to the reasonably perceptive host as to the bartender. The danger and risk to the potential victim on the highway is equally as great regardless of the source of the liquor." (id. at 153)

Finally, in a perfunctory analysis of the policy factors the court states merely:

> "[4] & [5] There exists a strong public policy to prevent future injuries of this nature, and we may assume that insurance coverage (doubtless increasingly costly) will be made available to protect the social host from civil liability in this situation" (id. at 153).

Thus, in analyzing these factors, the court summarily finds the balance weighing in favor of finding liability.

As pointed out in Kindt v. Kauffman, supra, at

> "The courts must fit decisional law to changing times as best they may, leaving the executive and legislative branches to protect the business community and public against unwarranted financial burdens."

The courts decided civil liability for furnishing of alcoholic beverages. Through analysis of the facts of each case and the justice sought to be done, it is now for the Legislature to decide as a matter of policy whether there should exist a civil action against thr furnisher of alcoholic beverages to common drunkards and obviously intoxicated persons.

In addition to the basic consideration of whether a civil cause of action for furnishing alcoholic beverages should exist, another task facing the Legislature is the resolution of issues left open by existing dram shop law.

B. Developments in the Law.

1. Open Areas

a. Assumption of the Risk and Willful Misconduct as Defenses:

When the doctrine of comparative negligence was first adopted by judicial decision, assumption of the risk insofar as it was a variant of contributory negligence was subsumed in the comparative doctrine.[13] The inference can be made that express assumption of the risk may still be a defense and, although no supreme court opinion has directly addressed the issue, many of the decisions seem to recognize it as a viable defense.[14]

Thus, it appears that when faced with the question, the courts would clearly recognize express assumption of the risk as a complete defense to dram shop liability.

It is important to note that, as in the Ewing case, by defining very broadly or narrowly the risk assumed, a court may allow and defeat recovery depanding on "their innate sense of justice." Therefore, in the Ewing case, recovery was allowed by defining the risks to include becoming intoxicated and the danger that the bartender wouldn't recognize it, but not the risk of alcohol poisoning (Ewing v. Cloverleaf Bowl, supra at 401).

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[13] See, American Motorcycle Association v. Superior Court (1978) 20 Cal. 3d 578; Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804.

[14] See, Ewing v. Cloverleaf Bowl, supra, 20 Cal. 3d 389, 401-406; Cooper v. National Railroad Passenger Corp., supra, 45 Cal. App. 3d 389, 393-94; See also, Report of the Joint Committee on Tort Liability: Procedural Reform, Series 78 - 6 , January, 1979.

Willful misconduct may also be a defense under principles of comparative fault. The most recent decision to address the issue was American Motorcycle Association v. Superior Court, supra. The Court in that case recognized that the Li opinion first read comparative negligence (id. at 55 Cal. App. 3d 694, 700). Then the Li decision was amended to read "comparative fault" (id. at 700). Thus, it would appear that the court intended the doctrine to apply not only to negligence, but also to willful misconduct and recklessness. If this were true, then willful misconduct of the consumer would not be a complete defense for the furnisher, but would merely reduct plaintiff's recovery.

The decision in Daly v. General Motors Corporation, (1978) 20 Cal. 3d 725, 734, would support the argument that the comparative fault doctrine should apply to willful misconduct since the court in that decision applied comparative to a strict liability theory, rejecting the argument that no comparison can be made between different kinds of fault, only degrees of fault (id. at 20 Cal. 3d 725, 734).

Therefore, it would appear that the courts would probably not recognize willful misconduct as an absolute defense in a dram shop liability case.

b. Cause of Action in Favor of the Intoxicated Guest Against the Social Host:

The Coulter opinion held only that a social host may be liable to a third person for injuries such person may sustain as a result of the host's furnishing alcoholic beverages

to his guests (Coulter v. Superior Court, id. at 151, 155). The court did not find a cause of action for injuries sustained by the intoxicated person. The underlying rationales of liability in Coulter were that: 1) the purpose of Business and Professions Code was to protect members of the general public that the guest is such a person, and 2) that the "fundamental principle of California law is that a person is liable for the foreseeable injuries caused by his failure to exercise reasonable care" (id. at 150, 152-53). To the extent that the underlying rationales in Coulter are also applicable to the injured intoxicated guest, under a logical extension of Coulter the social host should also be liable to the injured, intoxicated guest.

Moreover, this would be consistent with the extension of a cause of action in favor of the intoxicated patron against the commercial supplier (see, Ewing v. Cloverleaf Bowl, supra).

Thus, it appears a logical and consistent argument could be made supporting a cause of action in favor of the intoxicated guest.

2. New Legislation

Recently two bills were enacted in the area of dram shop liability.

a. California Statutes 1978, Chapter 929:

This is an act to amend Business and Professions Code Section 25602 abrogating the civil liability of any person

furnishing alcoholic beverages to any person injured as a result of intoxication by the consumer of such alcoholic beverage (Senate Bill 1645, 1978 Legislative Session).

The Legislation provides the legislative intent is to reverse the holdings of Bernhard and Coulter in favor of "prior judicial interpretation" finding consumption of alcoholic beverages rather than the selling of alcoholic beverages as the proximate cause.

It also amends Civil Code Section 1714 to express the legislative intent referred to above and also to abrogate the civil liability of a social host for furnishing alcoholic beverages based on that section.

Presumably this act abrogates all three of the present grounds of a cause of action for dram shop liability, i.e., Business and Professions Code Section 25602, Civil Code Section 1714 and the common law concept that a person is liable for foreseeable injuries caused by his failure to exercise reasonable case.[15]

The problem with the bill is that even before Vesely, under the "prior judicial interpretation" the courts developed doctrines to allow a cause of action.[16]

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[15]Coulter v. Superior Court, supra; Rowland v. Christian (1968) 68 Cal.2d 108.

[16]See, Thomas v. Bruza (1957) 151 Cal.App. 2d 150, allowing a cause of action based on negligent entrustment; see also, Carlisle v. Kanawyer, 24 Cal. App. 3d 587, allowing additional cause of action based on common law concept of duty to aid.

From a practical standpoint, too, this solution may not have the impact of reduction of premiums. The article "Liquor Liability" quoting George Salisbury, a Pasadena insurance broker, indicates:

> "Anytime you take a case to court there may be a new decision handed down that establishes a new precedent. It would open up a whole new liability to the public. On this basis he defends out of court settlements made prior to 1971 when case law followed the 1955 Cole v. Rush decision."

Thus, Chapter 929 may leave open bases for a cause of action such as negligent entrustment and duty to aid which existed prior to Vesely and it may not have the practical impact of reducing insurance costs due to settlements arising out of potential causes of action.

b. Chapter 930 is the second bill enacted in 1978 dealing with dram shop liability.

This act amends Business and Professions Code Section 25602 and provides that a civil cause of action for furnishing alcoholic beverages to an obviously intoxicated person shall exist only as against the seller. It abrogates the existing cause of action against a social host under Coulter. Further, Chapter 930 abrogates the cause of action in favor of the intoxicated person now existing under Ewing.

It contains language that the section is to be the sole and exclusive remedy against the seller and thus apparently would abrogate a cause of action under Civil Code Section 1714 and the common law.

It also negatives the present presumption under Section 669 of the Evidence Code caused by violation of Business and Professions Code Section 25602.

Chapter 930 places a one year statute of limitations and requires the intoxicated person be named as a defendant in the action until the litigation is concluded by trial or settlement.

As to this latter provision, it is questioned whether the benefit to the carrier in limiting the duration of potential liability outweighs the right of recovery to injured plaintiff. This is particularly true in light of the fact that even though an action may be required to be filed within one year, under present doe practice a plaintiff may amend his complaint to name the commercial supplier anytime prior to the date of judgment.[17]

Otherwise, this act seems to reach a balance between the need for recovery on the part of an innocent injured plaintiff while still attempting to make the commercial suppliers burden easier by lifting the presumption of negligence through violation of statute and by disallowing a cause of action by the intoxicated patron.

Neither bill addresses the problem created by the standard of obviously intoxicated, nor the question of what defenses are available.

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[17]California Code of Civil Procedure Section 474, Larson v. Barnett (1950) 101 Cal.App. 2d 282.

C. The Facts

This report addresses the question of whether civil liability should be imposed against a furnisher of alcoholic beverages. Civil liability is dependent upon finding a cause of action the elements of which are duty, breach of duty, causation, and damages. While breach of duty, causation in fact and damages are questions for the trier of fact, the question of duty (also analyzed as proximate or legal cause) is essentially a question of law, whether those in charge of making the law will extend responsibility for the conduct of furnishing intoxicants to the consequences which have in fact occurred. Determination of whether there should be a duty imposed upon furnishers of alcoholic beverages traditionally involves analysis of administrative, economic, social, and moral policies.

In order to assist the members of the Legislature in their analysis of these policy factors, the Joint Committee on Tort Liability has compiled the following factual data. Sources of the data are given and where material was unobtainable except through an interested party it is so noted.

1. The Administrative Facts:

Acknowledgement of the existence of a duty on the part of the furnisher of alcoholic beverages would impose upon such furnisher the obligation that he conform his conduct to a certain standard of care. By existing case law, the courts have determined that the standard of care to which the furnisher should adhere was the same as that provided in Business and

PLATE 4

FATALITY RESULTING FROM ALCOHOL-RELATED ACCIDENT

Professions Code Section 25602; that a furnisher of alcoholic beverages should not sell, give or furnish alcohol to common or habitual drunkards or to those "obviously intoxicated." This standard may be administratively difficult to apply, both on the part of the furnisher and on the part of the trier of fact. This is because of the difficulty in determining who is or is not a common drunk or one who is obviously intoxicated (see, Kindt v. Kauffman, supra.).

In addition to the standard of care, the analysis of the administrative factor in determining whether as a matter of policy a duty should be imposed upon the furnisher of the alcoholic beverage also involves the consideration of how effective the imposition of a duty would be in preventing the risks of harm which furnishing alcohol are seen to create. Those risks include automobile accidents and alcohol abuse. Exhibit C attached hereto show the number of automobile fatalities and injuries from 1955 to 1978. It should be noted that in 1971 the courts first imposed civil liability against the commercial supplier of alcohol. The data shows an increase from 1971 to date in automobile accidents involving alcohol has a primary collision factor rather than a decrease. Thus, statistics from the California Highway Patrol do not support the conclusion that imposition of civil liability against those furnishing alcoholic beverages has reduced the number of alcohol-related automobile accidents. (Additional support of this conclusion will be provided pending receipt of outstanding committee inquiries.)

It appears the administrative factor weighs against recognition of a duty on the part of the furnisher of alcoholic beverages, at least from the standpoint of the present standard of care.

2. The Economic Facts:

Analysis of the economic factor in determining whether as a matter of policy the law should impose a duty upon the furnisher of alcoholic beverages involves balancing the relative cost to society of alcohol abuse and deaths against the cost and availability of insurance.

a. The Insurance Problem:

One of the allegations made by the California Restaurant and Bar Owners Association is that the California courts' imposition of duty upon the furnishers of alcoholic beverages has resulted in increased insurance premiums (see, Exhibit F). Exhibit F is results from a questionnaire of members of the California Restaurant Association. Members of the Association do not purport to be representative of the industry as a whole since they do not include "Mom and Pop" or individual entreprenaurs which make up the majority of the restaurants. Yet, the California Restaurant Association does account for approximately seventy-five percent of the income in the state from restaurants so it does represent the largest volume of the business. Results from the California Restaurant Association's survey show of 278 members returning the Questionnaire, that over the past

five year period 18 respondents had a 50% increase, another 18 had 100% increase in premiums, and the largest number of respondents, 35, had a 200% increase in premiums. Another 18 had greater than a 1000% increase. While the California Restaurant and Bar Owners Association members are obviously interested in reducing their overhead, including the cost of insurance, substantial increases have been confirmed by the Committee's own investigation of premiums paid by non-member bar owners. Additional factual support will be provided pending receipt of responses to committee inquiries. Moreover, since the enactment of chapters 929 and 930, it is recommended that the cost of premiums in this area be monitored in order to determine whether the grant of immunity achieved the anticipated reduction in premiums. (Exhibit F)

It should be noted here that the survey of the California Bar and Restaurant Association does not tie the increase in premiums to the extension of liability and, as an alternative to the extension of liability as a cause, it has been suggested that another reason for the increase in premiums are stock market losses sustained by the insurance companies (see, W. Foodservice, "Liquor Liability" supra).

Allegations made by those in the Alcoholic Beverage industry concerning the effect of the increase in insurance premiums include that many restaurant and bar owners are refusing to be insured or "going bare" or many are going broke. [18] Another

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[18] See, letter to Senator Song from Robert Scura, on file with Joint Committee on Tort Liability.

effect is to pass the increase in prices onto the consumer through increase in prices. (Further factual data is being compiled by the Committee.)

Since the decision in Coulter, another consideration is whether a social host as part of his homeowners policy can obtain coverage against this kind of liability.

b. The Alcohol Problem:

The availability and cost of insurance must be juxtaposed with the cost to society of alcohol abuse. In its report, "Alcohol and the State: A Reappraisal of California Alcohol Control Policies," The Department of Finance, Audits Division, estimated that the annual cost to the state of alcohol abuse problems is $2.1 billion dollars. Figures have previously been referred to and are contained in Exhibit C concerning the number of traffic fatalities and injuries caused by alcohol-related automobile accidents. Suffice it to say that the highway carnage resulting from alcohol abuse is catastrophic.

Certainly, if there can be a deterrent effect by imposing liability to avoid the enormity of danger to life and limb due to alcohol, the balance of the economic factor must weigh in favor of finding a duty on the part of the furnisher of alcoholic beverages. The burden of insurance may be ameliorated through alternative recommendations to be discussed hereinafter.

3. Social Facts.

The social facts have already been discussed above to a limited extent when discussing the economic cost to society

of alcohol-related accidents and alcohol abuse. In addition, the following should be mentioned. When the first dram shop laws were enacted, it was a reflection of the early twentieth century view that alcohol was an evil which a temperate society should seek to prevent. In the 1930's, after prohibition had been repealed, the use of alcohol became a socially accepted form of conduct and the laws began to regulate the extent of indulgence. Thus, in 1937 California amended its statute to prohibit furnishing of alcohol to an obviously intoxicated person. We now look again at our dram shop law and from the standpoint of the social policy, one must ask, just as the post-prohibition society recognized changes in the attitudes toward alcohol and so shifted the emphasis of its dram shop rule from the common drunkard to obviously intoxicated, do changes in the 1978 society from the 1937 society warrant a change from the obviously intoxicated standard?

In answering this question, the changes which have taken place include increase in automobile accidents and alcoholism, particularly among youth. The California Office of Alcohol Program Management estimates that 1.4 million Californians are problem drinkers and the largest single cause of death to young people between 16 and 24 are automobile accidents where alcohol is involved.

Thus, analysis of the social factor does show that a change is warranted.

4. Moral Facts.

Even recognizing the social concern about automobile accidents and alcohol abuse which may warrant imposition of a

duty, it must still be asked upon whom should this duty lie? As the Kindt v. Kauffman, supra, decision points out, the person who consumes alcoholic beverages has the primary responsibility for his own conduct. While this certainly is a moral truth, it must be viewed with a practical eye. Thus, in analyzing the moral factor, the reality that many of those who drink do not in fact accept the responsibility must be recognized.

In conclusion of the analysis of whether there should be a duty upon the supplier of alcoholic beverages, all the policies must be weighed to determine if the scales tip toward the imposition of liability and if so, to what extent. Ultimately this is a question for the lawmakers and, as a wise Justice Andrews once stated in Palsgraf v. Long Island Railroad, 59 ALR 1253, 1263: "We draw an uncertain and wavering line, but draw it we must as best we can. Once again, it is a question of fair judgment, always keeping in mind the fact that we endeavor to make a rule. . . that will be practical and in keeping with the general understanding of mankind."

V

RECOMMENDATIONS

1. In view of the extreme cost to society of life and limb the policy of the state should recognize a civil duty on the part of furnishers of alcoholic beverages. This means the repeal of the two newly-enacted pieces of legislation.[19]

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[19]SB 1645 and SB 1175, Chapters 929 and 930, Laws of 1978, amending Business and Professions Code Section 25602 and adding Business and Professions Code Section 25602.1.

2. The intoxicated patron's conduct in becoming intoxicated should raise a presumption of his assumption of the risk. The standard which should be incorporated into Business and Professions Code 25602 and Civil Code Section 1714 should be:

> "No person shall give, sell or furnish alcoholic beverages to a person known to the giver, seller or furnisher to the obviously intoxicated or common drunkard. Knowledge shall be defined as actual knowledge or knowledge of such facts which under the circumstances would enable the giver, seller or furnisher to foresee a serious risk of harm to a third person resulting from such furnishing, giving or selling."

3. Evidence Code Section 669 providing a presumption of negligence should be made inapplicable to Business and Professions Code Section 25602. We recommend that there be a comment to Business and Professions Code Section 25602 that in so doing the standard created by the statute imposes a civil cause of action, but that there would be no shifting of the burden of proof to the defendant.

4. The furnishing of alcohol, under the law, may be the cause in fact of the injury if the furnisher foresaw or should have foreseen the risk of harm to a third person.

5. Express assumption of the risk should be a defense to a cause of action for furnishing alcoholic beverages where the plaintiff had knowledge of the intoxicated condition of the patron or guest and nevertheless proceeded to expose himself to the risks created by intoxication, e.g., accompanying an intoxicated driver and subsequently being injured.

6. Neither civil liability nor immunity of a social host should be expressly enacted by statute. Absent statute, the common law standard of care that the social host must have created a risk of harm which was foreseeable would apply. In those cases, it would appear that the requisite standard would be to only impose liability against the social host for those situations in which the social host had actual knowledge of the condition of his guest.

E X H I B I T A

LIQUOR LIABILITY

Skyrocketing premiums and confusing legalities bedevil California operators since a 1971 Court decision reversed the law

Three years ago Ron Fletcher didn't bother carrying liquor liability insurance for his restaurant in Rancho Mirage, California. Today, he is paying $2500 for a million dollar policy.

Last year, Palm Springs restaurateur Paul Di Amico paid $400 for liquor liability insurance. This year he's paying $4000. Next year he may be spending a lot more, if he can get any coverage at all.

Fletcher and Di Amico are not unusual. Like thousands of other California operators, they are victims of skyrocketing insurance rates arising from the State Supreme Court's 1971 about-face on the third party liability of those who serve alcoholic beverages. Premium increases of 500 to 1000 percent are common. And many insurance companies are refusing to carry such policies, period.

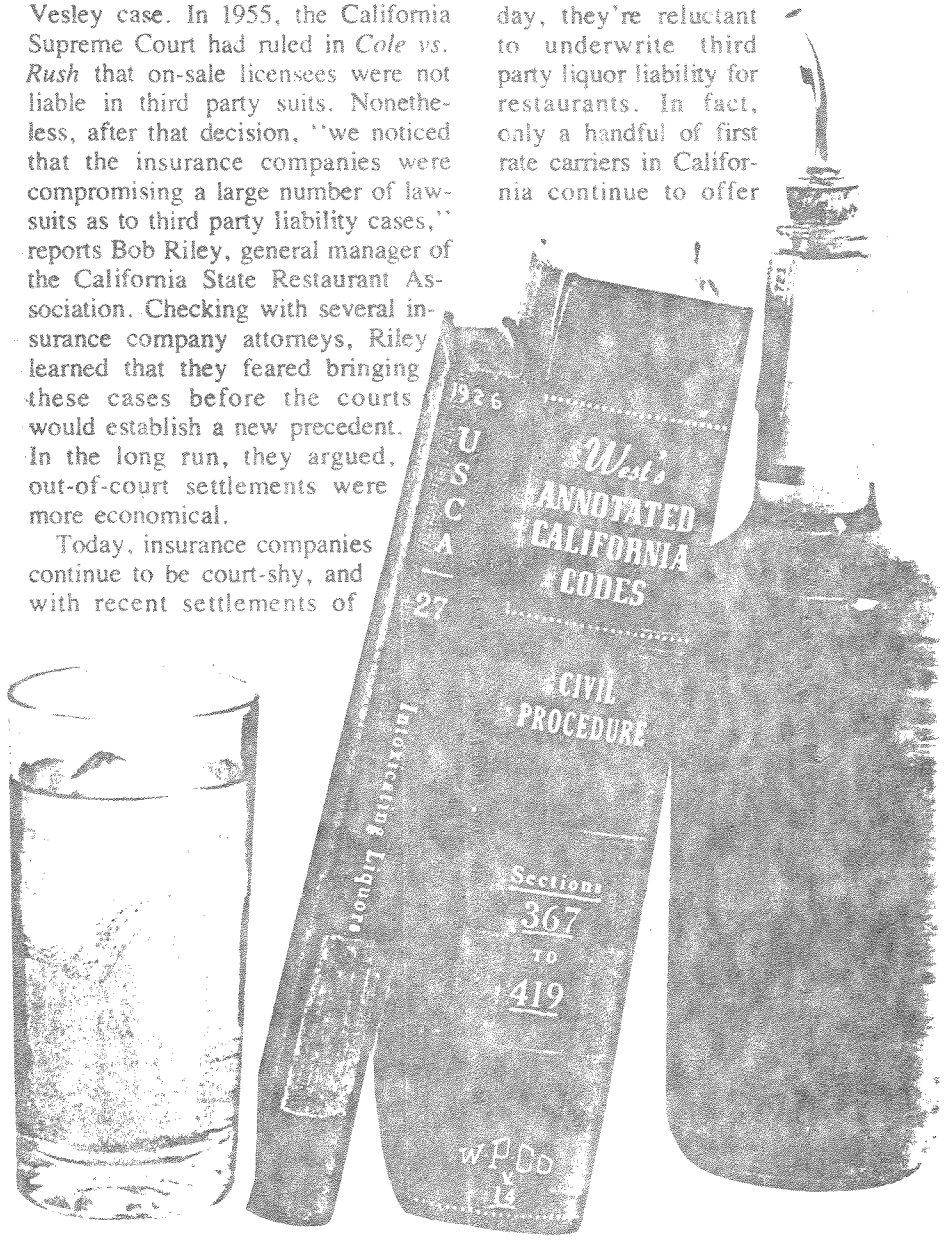
Essentially, the law today in California is that an on-sale licensee who serves an alcoholic beverage to an obviously intoxicated person may be held liable for any injuries that person causes someone else. The consequences of this new liability are costly and confusing to many restaurateurs. And because adequate coverage at a reasonable price is very difficult to find, some operators are starting to "go bare." Many believe the future of the industry itself is threatened. "No one is going to build up a restaurant all his life if he could go out of business overnight," Fletcher points out.

Ironically, before 1971 many insurance companies practically gave away liquor liability coverage as an inducement to buy other policies. That's because California courts followed common law principles, which held that the *consumption* of alcohol, not its sale, was the "proximate cause" of any injuries done a third party. Restaurateurs and tavern owners had no third party liability for the acts of an intoxicated patron.

The California Supreme Court changed that, abruptly and with still unraveling consequences, in its landmark decision *Vesley vs. Sager 1971* (see "California's Key Cases," p. 13). After 150 years of relative immunity, sellers of alcoholic beverages became liable in third party cases involving the excessive use of intoxicants.

Court-Shy Carriers. But as a matter of fact, if not of law, the picture had been changing long before the Vesley case. In 1955, the California Supreme Court had ruled in *Cole vs. Rush* that on-sale licensees were not liable in third party suits. Nonetheless, after that decision, "we noticed that the insurance companies were compromising a large number of lawsuits as to third party liability cases," reports Bob Riley, general manager of the California State Restaurant Association. Checking with several insurance company attorneys, Riley learned that they feared bringing these cases before the courts would establish a new precedent. In the long run, they argued, out-of-court settlements were more economical.

Today, insurance companies continue to be court-shy, and with recent settlements of over $1 million and hundreds of cases now in litigation, it's easy to see why. Losses are severe. "You don't have a lot of frequency, but when you have a loss, it's a 1.1 or 1.4 million dollar loss," observes George Salisbury, a Pasadena insurance broker with clients in the restaurant business. In order to cover such whopping awards, insurance companies must dig deep into their reserves. Today, they're reluctant to underwrite third party liquor liability for restaurants. In fact, only a handful of first rate carriers in California continue to offer



this protection at all. And their number is dwindling steadily.

Ominously, indications are that the number of claims is increasing at an alarming rate. Salisbury made an informal poll of insurance adjustors in the state and came to the disturbing conclusion that there are currently a thousand cases pending in California. And he thinks that figure is probably conservative. Large jury awards in a few cases have caught the attention of the public, notifying lawyers and victims alike of the restaurant owner's vulnerability.

Long Tails. "What really concerns insurance carriers is what they call the *tail*," explains Len Winegar, another broker with offices in Fresno. "Three or four years after an incident the restaurant owner is suddenly involved in a suit. The time lag is so great, the insurance companies have no way of knowing what they need in reserves."

Insurance broker George Salisbury counts 1000 cases pending in California.

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It's physically impossible for restaurants to ensure that every patron who leaves is sober.

Indeed, it may be years after an accident before litigation turns up against the on-sale licensee. Although a personal injury action in California in most cases must be filed within one year, the plantiff's attorney can allege several John Does in the petition. The legal machinery eventually grinds out the name of the establishment where the primary defendant had been drinking, and John Doe is identified as a bar or restaurant owner.

This is an extremely difficult situation to defend. Neither the insurance investigator nor the operator himself can locate witnesses. Former employees have moved without leaving a trace. Lacking a strong defense, insurance companies are inclined to settle out of court for sums they believe will be much less than a jury would award to a sympathetic victim.

"Insurance companies have a fundamental public relations problem," Salisbury emphasizes. "People tend to think they are an endless source of money. That isn't true. The money they have is the money of their customers. When the company sustains these big losses, the cost of insurance naturally goes up."

Many operators argue that the insurance companies have been too quick to settle out of court. "The plaintiff and defendant should be forced to go to court," says Ron Fletcher. "Once you settle out of court, people think 'Oh, this is easy.'"

"The insurance companies are taking a frightened view and paying exhorbitant judgments," declares Jerry Stevenson, chairman of the California Beverage and Dining Association. "I think they should stand and fight."

Winegar concedes that this argument has merit, then points to the tremendous cost of defending a suit, ranging on an average from $10,000 to $25,000. The insurance company is generally better off with a settlement, he insists.

Salisbury agrees. "Anytime you take a case to court there may be a decision handed down that establishes a new precedent. It could open up a whole new liability to the public." On this basis he defends the out of court settlements made prior to 1971 when case law followed the 1955 *Cole vs. Rush* decision.

Stock Market Losses. The cost of settling liquor liability suits has undoubtedly hurt some insurance companies in the last few years. There may be another explanation, however, for the dramatic rise in insurance premiums that has struck not only restaurants but other policyholders including doctors and automobile operators. At a recent SCRA meeting convened to discuss the liquor liability problem, general manager Bob Riley cited an Underwriter's Report that in 1974 and 1975 the liability insurance industry suffered substantial deficits of which over 50 percent were stock market losses.

Policyholders may be paying higher premiums to restore insurance reserves seriously depleted through failed management and investments. Some industry spokesmen do admit there is some truth to this accusation. But they also point out that every business experiences cycles of profit and loss; the cost of the product or service it sells will be affected accordingly.

In any event, insurance brokers claim the liquor liability market is so thin it's difficult finding carriers to insure their restaurant clients. In many cases the cost to the operator is prohibitive even when the coverage is available. So some restaurants are be-

Di Amico, Winegar, Stevenson: How to rouse the sleeping giant?

ginning to "go bare — and take their chances.

Percentage of liquor to food sales is generally the most important consideration in calculating a restaurant's exposure to loss. If wine and beer sales make up a substantial portion of the liquor receipts, insurance companies figure the risk is correspondingly reduced. Salisbury stresses the importance of good, stable management and a clean past record. "Underwriters are more likely to go with a dinner house in an outlying district that's never had a loss and been in business 20-30 years," he says.

"But why can't we get lower insurance rates if we take steps to minimize the possibility of a suit?" some operators wonder. Salisbury says that he and other brokers are trying to persuade carriers to offer reduced rates to restaurants with loss prevention programs. "Risk management does help operators get coverage," Salisbury explains, "but so far we haven't been able to introduce any deductibles."

The real key to pushing back insurance liability costs is clamping a lid on damages, say the insurance companies. This would enable them to make actuarial predictions of losses and establish fair and reasonable rates. Winegar and Salisbury agree this is an important and necessary step, but consider it an interim solution. They support tort reform for the entire products liability field. Salisbury recommends a modification of legal contingency fees and elimination of lump sum payments in favor of annuities paid to the victim as a yearly income. He also calls for more equitable and moral treatment of *all parties* in the courts.

"The insurance industry is feeling the crunch of the consumerism movement," Salisbury observes. "And it's come to the point where everytime someone's hurt the public thinks an insurance company is going to pay. It's great in theory, but it's expensive, and I don't know if we can afford it."

Sitting Ducks. "There's no way a licensee can avoid becoming a defendant in a lawsuit as long as the driver has little or no insurance," declares Marshall Hunt, the attorney who defended the Chopping Block Restaurant in the Stacy case. Hunt explains that when filing a suit the plaintiff's attorney customarily names every bar and restaurant a defendant may have visited. And once a customer becomes obviously intoxicated in a restaurant, the operator is a "sitting duck," he adds.

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It's against the law in California to sell or otherwise furnish liquor to any habitual drunk or obviously intoxicated person. And since 1971, restaurateurs may be liable virtually without limitation for the injuries inflicted on a third party by an intoxicated patron. Many consider the present law neither reasonable nor just.

"It's physically impossible for restaurant operators, the way they do business, to ensure that everybody who leaves their establishment is sober," emphasizes Jerry Stevenson, who has owned six restaurants himself. Drinking is too subtle and complex a phenomenon for restaurants to effectively police. "We all know the law," observes Ron Fletcher, whose Lord Fletcher's Inn was established 10 years ago. "If a man is staggering, we're not going to serve him. But we can't be another man's keeper."

Fletcher notes that a restaurant, par-

Continued on page 16

Paul Amico's premium jumped from $400 $4000 this year.

California's Key Cases

Cole vs. Rush 1955

In October, 1950, James Cole was drinking at a bar in Los Angeles. A violent drunk, Cole got in a quarrel outside the bar and was killed by a blow to the head. His wife sued the bar for damages, alleging that the owners had continued to serve Cole even after he was drunk.

The State Supreme Court ruled that any wrong done by selling liquor to Cole was not the "proximate cause" of injury, and his drinking was contributory negligence barring recovery by his heirs.

Vesley vs. Sager 1971

In April, 1968, drunk driver James O'Connell collided with Miles Vesley on Mt. Baldy, California. Vesley sued the owner of the lodge where it was alleged O'Connell had been drinking heavily from 10 p.m. to 5:15 a.m., even though the owner realized O'Connell was intoxicated, and the road from the lodge was narrow and winding.

Overturning *Cole vs. Rush*, the State Supreme Court ruled that the lodge owner was liable. The seller of alcoholic beverages has a duty to the public to protect it from "injuries to persons and damage to property from the excessive use of intoxicating liquor."

Stacy vs. Melting Pot Restaurant 1976

James Stacy and companion were riding a motorcycle in Los Angeles when they were hit by drunk driver Carter B. Gordon in September, 1973. Stacy lost an arm and leg; his passenger was killed. Stacy filed against the Chopping Block Restaurant in Beverly Hills where Gordon had been drinking. It was alleged that Gordon had been served after he was obviously drunk.

The jury awarded Stacy $1.9 million. Appeals have reduced the settlement to $1.4 million.

Bernhard vs. Harrah's 1976

Returning home from Harrah's in Reno, Nevada early one morning in 1971, a married couple drove into motorcyclist Richard A. Bernhard. Bernhard sued Harrahs, charging that the operation's employees had served alcoholic beverages to the couple after they were obviously intoxicated.

Nevada law does not hold Harrah's liable, but Bernhard filed suit in California on the basis of that state's law. He is asking $100,000. A decision is still pending at this time.

Brian Rea: It's a cuckoo law.

ticularly at peak hours, is too busy for its staff to check on the sobriety of all customers. And patrons often drink at home before going out. "We couldn't know in every case if someone's had three or four drinks when he comes through the door unless the waitress made him blow into a breath analyzer," he adds with a grimace.

A Cuckoo Law. The phrase "obviously intoxicated" troubles a lot of operators. "It's so damn difficult to interpret," explains Bob Scura, president of Grand American Fare, a chain of 10 saloon/restaurants in California, Colorado and Arizona. Scura's point is that customers' tolerances and reactions to alcohol vary greatly. Some patrons are naturally boisterous, others become so when they drink. Yet alcohol also makes many people quiet and introspective. And because of its delayed effects, a patron who seems sober in a restaurant can become a drunk driver minutes later on the road.

Heavy drinkers often appear normal after several martinis, at least to the layman's eye. But novice drinkers can be "obviously" intoxicated after just one or two glasses of wine. As Scura says, if it were easy to establish intoxication, the police wouldn't make so many observations and tests during an arrest for drunk driving.

The possibilities are hair-raising for many restaurateurs. They note that it's not unusual for a heavy drinker to enter a bar or restaurant for a nightcap after spending the evening someplace else. If the establishment is crowded, this intoxicated patron may get served, then depart, without being noticed by the employees. But if he gets in an accident, the operator may be liable in a third party suit. It is this kind of possibility that leads Brian Rea, beverage consultant for Host's restaurant division, to describe the law as "totally cuckoo." Most restaurateurs would probably agree with him.

Steps can be taken to diminish the chances of a lawsuit. "Probably the key factor in avoiding liability lawsuits is employee education," emphasizes the SCRA's Bob Riley. A formal program that details procedures is essential. Periodic staff meet-

Tex Peeples: Still in Business

The pathos and sensation of the Stacy tragedy thrust the case into public view where it became the catchphrase for the liquor liability dilemma. Tex Peeples, owner of the defending restaurant, was sued and lost. His insurance will pay the $1.4 million settlement. But the episode cost dearly in other ways.

"Where it hurt most was in legal fees, time and mental aggravation," Peeples explains. Conferring with attorneys, making depositions and sitting in court kept him from work for long stretches. Business suffered in his absence.

The implication that his negligence was somehow to blame also bothers the soft-spoken Texan. Following publicity in the local media, Peeples was plagued with a spate of hate calls and letters. "I've had people phone up and call me a murderer," he says. "They tell me I must be a lousy operator or this Stacy thing would never have happened."

By bizarre coincidence, Peeples knew both victim and slayer. Carter Gordon and Jim Stacy were regular customers. When Peeples learned of the accident, third party liability was far from his mind. Carter Gordon had no insurance, however, and three months later Stacy's attorneys came after the Chopping Block assets.

Peeples was away from the restaurant the night of the accident. His manager told him later that Carter only had a few drinks that night; one or two at first and after a two to three hour absence, a couple more. "My employees told me he wasn't drunk when he left here," Peeples says. But the jury believed otherwise. "In court there's really no way to prove whether a man was intoxicated or not," he adds.

Has he changed his liquor operation since the accident? "Not really," Peeples replies. "I say the same thing to my employees serving alcohol that I did five years ago: 'Just use your head and if a man's had too much and you feel he's showing signs of being intoxicated or drinking one right after another, call the manager and tell him.' When anyone is feeling high or shows any of those signs, waiters and bartenders that work for me are told to cut him off."

Tex Peeples: I'm not bitter.

It once cost Peeples $120 after he pocketed an intoxicated patron's keys. "The customer drove a Mercedes-Benz," he recalls, "and was terribly proud of it. The man insisted I change all the locks in case someone made copies from his key ring."

Peeples claims these problems are rare in his restaurants. The Melting Pot in West Hollywood serves only beer and wine and at Machos in nearby Westwood Village the food to liquor mix is about five to one. Liquor sales were even less at the Chopping Block Restaurant.

Peeples feels no rancor or resentment toward Stacy. "I can't blame him. I'd probably sue too if I lost an arm and a leg," he says. But Peeples thinks the law allowing such suits is ridiculous and threatens the industry.

"Common sense tells us that if a lady falls because a chair breaks, you should check the chairs more often," Peeples philosophizes. "My feeling is that all an operator can do about this liquor liability situation is show the same sense and try to be cautious. But I don't think we can really protect ourselves as long as the courts and the law of the land continue to make an operator responsible for what a person drinks."

78-133

In California it can be years before a restaurant is named in a suit. Such cases are virtually impossible to defend.

ings to go over questions and problems are important, too. Employees must understand that they have the right and the duty to refuse alcoholic beverages to any intoxicated patron. "Our people are taught that if there's the slightest doubt in their minds — don't serve," observes Brian Rea.

Operators who discover they have served an obviously intoxicated patron can face a demanding and potentially dangerous situation. Hunt and others recommend offering a sandwich and cup of coffee as a delaying tactic to sober him up. Or calling a taxi, if that will get him home safely. When the drunk insists he will drive himself home, the restaurateur has few options. Calling the police may result in an arrest, a scene restaurateurs would rather avoid. Physical force by the restaurant staff is ill-advised. "I wouldn't lay a hand on him," stresses Hunt, "Just document your efforts."

Once the possibility of a lawsuit exists, the wise licensee begins gathering evidence immediately and notifies the insurance company as soon as possible. In California, it can be over a year before an operation is specifically named in a suit. By then, key witnesses may be hard to locate and important documents lost. "How do you construct a defense of a year-old incident?" asks Jerry Stevenson. "Evidentiary problems make these cases virtually impossible to defend," he adds.

Forgotten Industry. If liquor liability lawsuits are difficult to avoid and nearly impossible to defend, the industry's salvation may lie in legislative relief. But many operators feel overlooked and ignored by the powers in Sacramento. "We're just a forgotten industry," Ron Fletcher says. "I don't think our political officials in Sacramento realize how hard the restaurateur works and the problems he has."

In 1976, a bill was introduced in the State Legislature by Assemblyman Tom Suitt of California's 75th District seeking limitations on liquor liability. Called *AB 3910*, it specified that licensees who sell or otherwise furnish an alcoholic beverage to any obviously intoxicated person have a third party liability not to exceed $100,000 for each injured person and $250,000 for each group of people. The bill passed the Assembly by a solid 46-13 vote. But the Senate Judiciary Committee referred the bill to interim study, "a well-known graveyard of legislation," according to Jerry Stevenson. Opposition came from the State Alcohol Beverage Control Department, the Trial Lawyers Association, as well as religious groups who considered it a "pro-drinking bill."

Activist restaurateurs like Ron Fletcher, Bob Scura and Paul Di Amico plan to work for the passage of a similar bill in 1977. "Some of us have been working on this for two years," notes Di Amico. "We're as busy as anyone, but we're not going to give up." These restaurateurs believe their industry must make a concerted effort to support legislation. "We're a sleeping giant," says Jerry Stevenson. "What we need is unity," adds Scura. "We don't have the clout because we're not organized."

Scura recommends that operators join trade associations. Stevenson urges on-sale licensees to write their state legislators and the governor. They seek the active support of more industry figures. And to wage a successful campaign, they need money. Says Di Amico: "If every restaurant in the state donated the cost of one drink to an industry fund, we'd have more than enough money to get our message across."

Until then, only those restaurateurs who serve no liquor at all can be certain to avoid a costly lawsuit.

Ron Fletcher: We're a forgotten industry.

To help focus government attention on the liquor liability problem, WF is sending a copy of this issue to the Governor of California and every member of the State Legislature.

If it's easy to spot a drunk, why do the police make so many tests?

78-134

BOB SCURA: WE NEED UNITY!

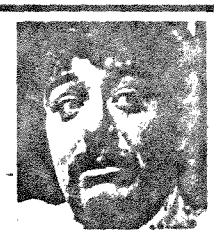
Grand American Fare is a chain of 10 saloon/restaurants in Arizona, Colorado and California specializing in the college market. "We sell fun," says Robert Scura, company president. But GAF also sells alcoholic beverages to some 60,000 customers a week, with a chainwide mix in total sales of 70 percent liquor, 30 percent food. It all adds up to very high liquor liability premiums for Scura and Grand American founder Al Ehringer.

At GAF's headquarters in Santa Monica, California, Scura talked about his experience with liquor liability and his efforts in support of dram shop legislation.

Western Foodservice: How has Grand American Fare been affected by California's third party liability law? Undoubtedly, your premiums have soared.

Robert Scura: Last year our insurance liability package, which included liquor liability, ran us $35,000 for the chain. This year it's costing us $150,000 for much less coverage. When you add in another $100,000 for fire insurance, workmen's comp and the like, we have a yearly premium of a quarter million dollars. Since our chain sales are $6 million, those premiums take a large bite out of our net profits.

Obviously, we can't continue like this. If our insurance costs $250,000 this year, what will it be next year? It may reach a point where we say: "If there's no profit, why not sleep late?"



"Obviously, we can't continue like this. It may reach the point where we say: If there's no profit, why not sleep late?"

WF: Besides costing a lot of money, does the liquor liability problem involve any hidden costs?

Scura: It sure puts dampers on an energetic, growth-oriented chain. In the early 70's, our concept was the darling of the industry. Now banks are very careful because of our uncertain liability situation. We've had to hold back on our expansion program. It would be foolish for us to build another operation in California until this problem's resolved.

"It would be foolish for us to build another operation in California until this problem's resolved."

WF: In other words, it's distorting your entire business picture

Scura: And our thinking as well, because if we don't get reasonable limits on liability, the day may come when we can't get insurance at all. Then if we're slapped with a lawsuit, we might as well hang up our keys and go to the beach. And years of effort to build the company will go down the drain.

WF: We understand that Grand American has already been involved in a major case.

Scura: In 1973, a man alleged to have been drinking in Fanny Ann's, our Sacramento operation, was later in an accident which killed another man. This was a Friday night. Fanny Ann's had been open only three months, and it was wall-to-wall people. Who knows how long this guy was there, or how much he had to drink? No drunk test was done on him, because it was hit and run. He turned himself in a week later.

The insurance company settled for about $1 million. If they'd fought the case, I think they could have substantially reduced the amount. They cancelled us, of course.

WF: As a result of this experience, did you change your procedures concerning alcohol?

Scura: Yes, we did. For one thing, we used to have an "Annual Going Out of Business Sale," where we sold all drinks for a quarter. It was our most effective promotion. But it was introduced as evidence against us in the Fanny Ann's case, so we pulled back on it. Also, we won't sell pitchers of drinks. All of our advertising is on a much lower key.

Every employee of this company knows not to serve an obviously intoxicated person. Our floormen are trained to look for people who stagger or otherwise appear drunk. But it's so damn difficult to interpret "obviously intoxicated." In just about every restaurant and bar in California, someone will be served a drink tonight who has a blood alcohol over 0.10, because he doesn't appear obviously intoxicated. But if he's later involved in an accident, he's considered a drunk

driver. Restaurant people are expected to make judgments about intoxication that law enforcement officers have to make all sorts of tests to prove.

WF: You do have the advantage of carding people at the door which makes it easier to keep blatant drunks off your premises.

Scura: We not only card people, we pay our doormen bonuses for turning up phoney ID's.

WF: Your Oar House in Santa Monica is famous for carding everybody.

Scura: Listen, I was carded there the other night. It was a new manager who didn't know me, but I thought it was super. A lot of people say we card too much. But we don't want our doormen to guess people's ages. So we have them check everybody.

WF: Some people suggest that a precaution restaurants and bars should take to avoid serving drunks is to have the staff talk to all new customers to see if they're sober or not. Is this practical?

Scura: No, you can't do it. If we had the time to chat with every customer, we'd need as many employees as patrons. And we don't even have waitresses, just bartenders. What should a bartender do when a customer orders two scotch and waters and a beer for his table? Tell him to bring his friends over so he can check them out?

WF: The foodservice industry is a giant. Yet it seems to lack the political clout of many smaller industries and pressure groups, which makes it difficult to pass effective dram shop legislation. Why is that?

Scura: We don't have the clout because we're not organized. One reason for this is our secretiveness. We seem afraid that our competitors might discover how we make or promote a special product.

What we need is unity. Operators should join the associations and work together on this. Then we'll have influence.

WF: Many operators point out that foodservice often demands long hours, including holiday and weekend work. There's little time for political activity.

Scura: All of us put in the hours, but if it's important enough, we can schedule the time. And I think operators, at least in this area, are beginning to realize that it is that important. The Stacy incident happened just down the street. And only by the grace of God was the man involved drinking in the Chopping Block instead of another Westside restaurant. So the message is clear.

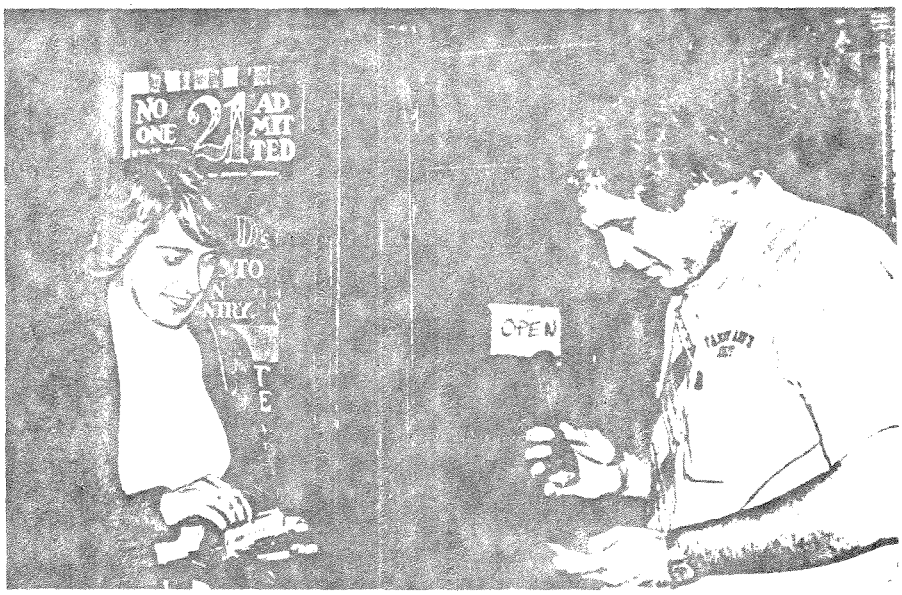
I didn't realize the severity of the problem until six or seven months ago. We had great difficulty getting liquor liability coverage, although we finally signed with a strong company. Restaurants are just target defendants, so I told them we wanted to voluntarily increase our deductible to $5,000. Now we handle the cases of alleged falls and chipped teeth, all that nonsense.

WF: What is the solution to the liquor liability problem?

Scura: Legislative limitations on liability are the best of the temporary solutions. Then the insurance companies could at least calculate their exposure, and we would have reasonable premiums. The only long range solution, however, is tort reform covering all of product liability, of which liquor liability is a special case.

Without legislation or tort reform, the insurance companies may eventually stop writing. Then our entire industry will be in a shambles. You might start seeing a lot of black bags filled with cash, because operators would think: "Why give my money to someone else? If a bad day comes, let's give away the keys and head for Mexico." I'm not saying that's right, but it may come to that. So we've got to get some legislation passed this year, even if it's just a beginning.

Scura relaxes for a moment at Buffalo Chips.



Mgr. Jim Furry sees that everybody gets carded at the Oar House.

E X H I B I T B

ROBERT J. SCURA
PRESIDENT

May 25, 1977

78-137

GRAND AMERICAN FARE
INCORPORATED

2941 MAIN STREET
SANTA MONICA, CALIFORNIA 90405
(213) 450-4900

THE OAR HOUSE
SANTA MONICA, CALIFORNIA

FOGGY'S NOTION
SAN DIEGO, CALIFORNIA

BUFFALO CHIPS
SANTA MONICA, CALIFORNIA

ST. JAMES INFIRMARY
MOUNTAIN VIEW, CALIFORNIA

J. SLOANS
HOLLYWOOD, CALIFORNIA

MINDER BINDERS
TEMPE, ARIZONA

BULL & MOUTH
RIVERSIDE, CALIFORNIA

FANNY ANN'S
OLD SACRAMENTO, CALIFORNIA

BUM STEER
TUCSON, ARIZONA

DARK HORSE
BOULDER, COLORADO

MADISON BEAR GARDEN
CHICO, CALIFORNIA

Senator Alfred H. Song
State Capitol Building
Sacramento, CA 95814

Dear Senator Song:

Having communicated with you previously on this subject, I don't feel the need to reiterate the unfairness of third party liability. But I would like to give you some specific facts as to what it has done to our organization.

1. Our insurance premiums for liability alone increased from $35,000 per year to $160,000 this year. Adding in workmen's comp and fire, our annual insurance premium is $260,000. This accounts for eight percent of our California sales. Sir, this means we pay more for insurance than we do for rent.

2. In order to save our ridiculously high coverage, we have to self insure the low end for $5,000. This means we also pay all small claims, fraudulent claims, rip off attorneys, etc. This is running us another $25,000 per year.

3. There are very few carriers writing insurance. When we lose our coverage, we're out of business. Period. We will put 400 people on unemployment, not to mention the additional loss of revenue to the state.

I urge you to vehemently support Assembly Bill AB 1395 by Assemblyman Papan and SB 1175 and 1176 by Senator Foran. Our industry needs your support.

Sincerely,

Robert J. Scura
President

RJS:tb

cc: Governor Edmund G. Brown, Jr.
Mr. Baxter Rice

E X H I B I T C

California Department of Highway Patrol Report of fatal and injury motor vehicle traffic accidents 1971-76.

DATE	DEATHS	INJURIES
1971	1,007	27,848
1972	1,153	15,112
1973	1,356	16,640
1974	1,769	32,980
1975	1,121	17,696
1976	1,680	50,987

DJ:jf

E X H I B I T D

MEMO OF PHONE CONVERSATION WITH RONALD R. McQUOID, June 27, 1978

Ronald R. McQuoid was insurance defense counsel for the carrier. He denied coverage stating the exclusion from coverage of furnishing intoxicants in this case was applicable. He denied knowledge of the settlement in this case. This is interesting in that the memorandum of the phone conversation with Mr. Milton Hadley this same day points out that the defendant entered into a stipulated judgment with plaintiff who subsequently settled with the carrier.

Mr. McQuoid stated that the exclusion from coverage of liability resulting from the furnishing of intoxicants was common.

DJ:jf

E X H I B I T E

78-143

MEMORANDUM OF PHONE CALL

TO: Chalres McCrory
Attorney for Robert and Anthony Ewing
415/494-0611

FROM: Denise Jarman

DATE: June 23, 1978

SUBJECT: Ewing v. Cloverleaf Bowl (1978) 20 Cal. 3d 389

Present Status of Case: Settlement reached 5/78, amount: $130,000; Dismissal filed 8/24/78.

When asked what comments or recommendations he might have for the legislature in the Dram Shop area, he appeared happy with the situation under present case law. His reasoning in imposing liability against a bartender is "why should he occupy a privileged position? Surgeons, whose job is delicate, attorneys, drivers are all held liable."

When asked about the social host he stressed two key elements in imposing liability, foreseeability and obvious intoxication. He would limit the finding of these elements to such factual situations as the slurring of words, falling of a chair, etc.

My ideas: Statute defining the term "obvious intoxication".

DJ:df

EXHIBIT F

LIQUOR LIABILITY INQUIRY

Mailed to selected Directors (dinner house operators) of the Southern California and California State Restaurant Associations 34 questionnaires were mailed on 4-17-78; of the 14 questionnaires returned (41.2%), 13 were used to compile the following:

FIRM #	1974 % INCREASE OVER 1973	1975 % INCREASE OVER 1974	1976 % INCREASE OVER 1975	1977 % INCREASE OVER 1976	1978 % INCREASE OVER 1977	% INCREASE OVER PREMIUM CHANGE YR/NUMBER OF YRS.
1	0	0	567	3000	255	73233/3
2	0	0	301	89	2	674/3
3	19	9	69	149	-7	404/5
4*	0	58	121	219	-16	836/4
5*	NA	22	173	0	233	1011/4
6*	0	0	1901	NA	NA	1901/1
7*	-14	76	180	110	NA	790/4
8	243	21	182	537	NA	7348/4
9	NA	289	212	270	NA	4387/3
10*	NA	NA	683	61[1]	989	2900/3
11*	NA	NA	332	1	NA	337/2
12	NA	NA	NA	32	29	71/2
13	NA	NA	NA	761	NA	761/1
AVERAGE	35	53	429	426	212	14090/5

[1] Carrier change resulting in substantial 1977 premium reduction followed by radical 1978 premium increase

* Single unit operator

NA - Means not available

FIRMS RESPONDING IN RATES						
1	NA	NA	39	296	192	1503/3
2	NA	NA	168	162	16	715/3
AVERAGE	NA	NA	104	229	104	1269/3

78-145

The total percentage increases on the preceding page are based on the following base year and ending year liquor liability insurance premiums.

FIRM NUMBER	PREMIUMS BASE YEAR	ENDING YEAR	% INCREASE
1	$ 150	$110,000	73,233%
2	222	1,718	674
3	2,700	13,600	404
4	510	4,775	836
5	450	5,000	1,011
6	127	2,541	1,901
7	505	4,495	790
8	350	26,071	7,348
9	643	28,852	4,387
10	300	9,000	2,900
11	1,349	5,900	337
12	5,043	8,605	71
13	4,992	43,000	761

78-147

SOUTHERN CALIFORNIA RESTAURANT ASSOCIATION

FOUNDED IN 1906

REPRESENTING THE FOOD AND ALCOHOL BEVERAGE SERVICE INDUSTRIES OF SOUTHERN CALIFORNIA

Affiliated with the California State Restaurant Association

448 South Hill Street, Suite 612, Los Angeles, California 90013 / Telephone Area Code 213, 628-3371

ROBERT M. RILEY, General Manager

Through the offices of Assemblyman John T. Knox, Chairman, California Legislature Joint Committee on Tort Liability, and Assemblyman Robert G. Beverly, Vice Chairman of the Joint Committee, a Restaurant and Bar Owners Advisory Committee to the Joint Committee has been established. SCRA Director Ron Fletcher, Lord Fletcher Inn, Palm Springs is Chairman of the industry committee. This Industry Advisory Committee was appointed for a possible solution or relief in view of continuous, ever-increasing liquor liability insurance premium costs. As the Advisory Committee is to meet within the next 15 days, it has been requested that we obtain written communications from a number of on-sale licensees, such as your firm, setting forth a schedule of the increases in the firm's liquor liability insurance premiums for at least the last three years. If possible, six years would furnish this Advisory Committee with a more realistic trend. I am certain that your accountant or insurance broker can furnish you with this information with ease.

Your cooperation in forwarding the information requested on the enclosed self-addressed, postage paid card will assist the Restaurant Industry Advisory Committee in bringing to the attention of the Governor and Legislators that appropriate action is imperative to bring about a favorable vote on SB 1175 that is now before the Assembly Judiciary Committee. It will also assist the Committee to further its efforts in connection with the Joint Committee on Tort Liability.

Cordially yours,

Robert M. Riley
General Manager

RMR:mg/slh

Enclosure

78-148

QUESTIONNAIRE

SCRA COUNCIL OF

ALCOHOL BFVERAGE LICENSEES

Distribution: SCRA Membership on 10-27-77; of the 2508 questionnaires mailed, 278 were returned and used as the basis of the following survey. Although the response rate is somewhat less than staggering (11.1%), one must keep in mind the fact that the 2508 questionnaires mailed went to only about 1000 firms due to multi-unit membership. It is also assumed that most firms holding no liquor licenses did not return questionnaires.

78-149

QUESTIONNAIRE
SCRA COUNCIL OF
ALCOHOL BEVERAGE LICENSEES

Date _____

Name of Person Completing Questionnaire _____

Position or Title _____

A.

B. Name and address of firm (if different from A.)

_____

_____

Telephone No. ( ) _____

1. Are you or any of your locations presently licensed by the Department of Alcoholic Beverage Control? Yes *222*, No *56* (if "No", do you plan to obtain a license sometime in the future? Yes *14*, No *42*)

2. What type of license(s) do you or your firm presently have? (Indicate how many of each type)

3% a. On-Sale Beer *12* *(*2)*

31% b. On-Sale Beer and Wine *175* *(*139)*

*(*licenses held by establishments holding 2 or more licenses)*

c. On-Sale General:

65% Regular *366* *(*206)*

1% Seasonal *1*

Club *4*

TOTAL LICENSES: 558

3. Approximate percentage of gross sales you can attribute to alcohol beverage sales (including beer and wine sales) *See pages 3, 3a.*

4. Amount of Liquor Liability coverage you are presently carrying, $ *See pages 4, 4a, 4*

5. Approximate percentage of increase in your Liquor Liability premiums over the past five (5) years: 50% _____; 100% _____; 200% _____. If more than 200%, please indicate how much _____%. *See pages 5, 5a.*

6. Has a "Dram Shop" (Liquor Liability) suit ever been filed against you or any of your locations? Yes *25*, No *197*. If "Yes", please indicate how many, how much and disposition: _____

_____.

Settlement(s) obtained: *Pending - 15 (4 from 1 licensee) no amount; 1 @ $50,000; 1 @ $150,000; 1 @ $1 million; 1 @ $1.5 millic 1 @ 2 million.*

a. In court *0*

b. Out of court *1 @ $1.1 million; 1 @ $40,000; 6 @ $2,000 to $10,000; 1 (no amount)*

7. Other than Liquor Liability insurance, what do you feel is (are) the most pressing problem(s) facing on-sale licensees today? *See page 6*

8. Which, if any, of the ABC Regulations do you feel are too restrictive or burdensome? *See page 7.*

9. Do you feel that the legal drinking hours should be extended on the weekends?
9% *87.8%* *3.2%*
Yes *20*, No *195*. *No response* *7*.

10. Do you agree with lowering the constitutional age limit for drinking?
41.8% *50.9%* *No response* *16.* *7.3%*
Yes *93*, No *113*. If "Yes", what age? *2.2%* *8.6%* *9.6%* *2.2%*
0 (2); 18 (80); 19 (9); 20 (2).

11. Would you or one of your representatives attend seminars designed to enhance the overall efficiency and/or profitability of your alcohol beverage business?
71.6% *19.8%* *4.5%* *4.1%*
Yes *159*, No *44*. *Maybe* *10*. *No response* *9*.

12. From the licensee's viewpoint, toward what areas should the Association be directing more of its efforts? Please explain: *See page 8*

Additional Comments: *See page 9.*

RETURN TO SCRA OFFICE (envelope enclosed):

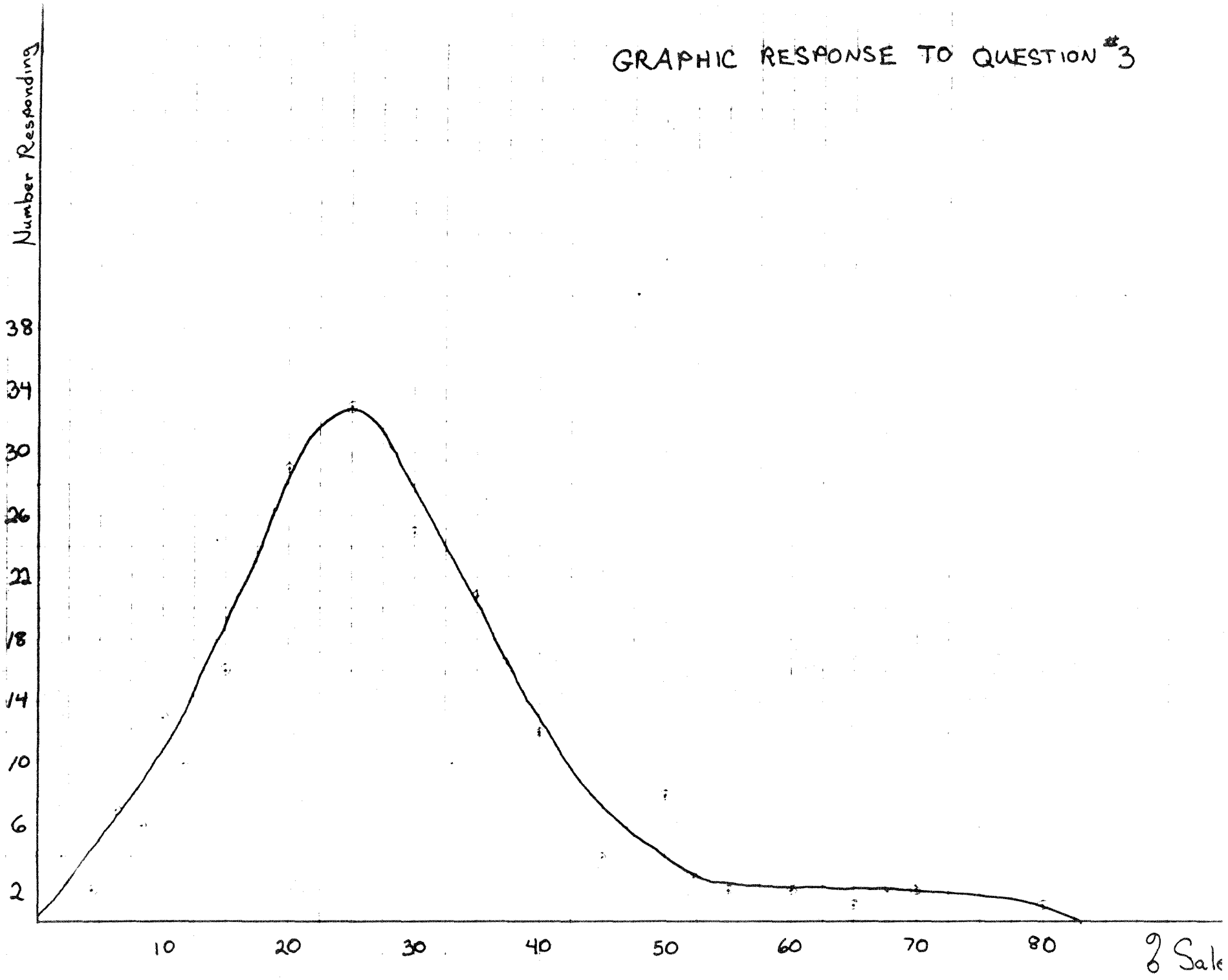
448 South Hill Street, Suite 612
Los Angeles, California 90013

78-151

Question 3: Approximate percentage of gross sales you can attribute to alcohol beverage sales _____%.

% Sales	No. of Respondents
Less than 1%	1
2%	4
4%	2
5%	7
8%	6
10%	13
12%	10
15%	16
20%	29
25%	38
30%	25
33%	10
35%	21
40%	12
45%	4
50%	8
55%	2
60%	2
65%	1
70%	2
80%	1

GRAPHIC RESPONSE TO QUESTION #3



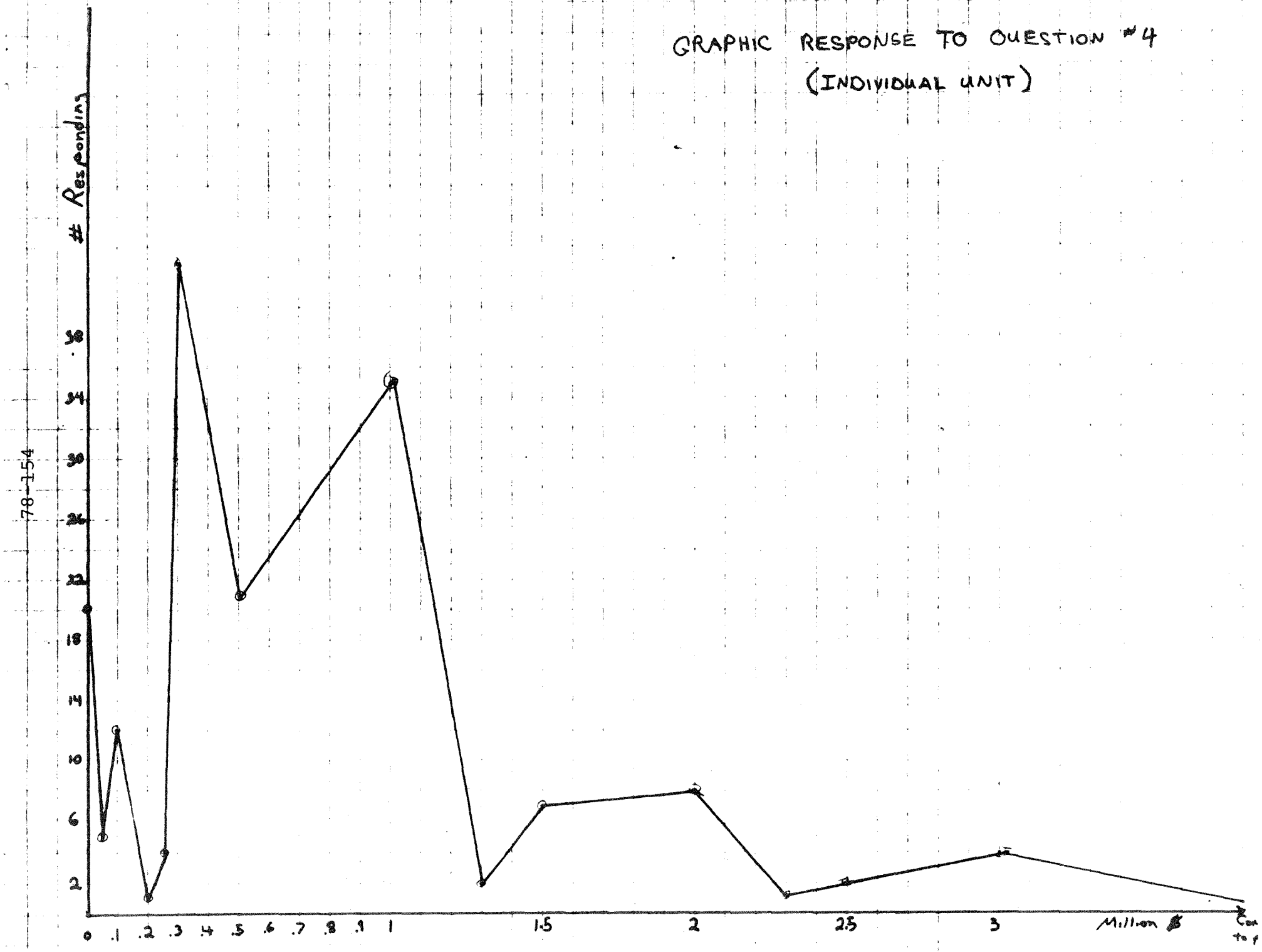
78-152

78-153

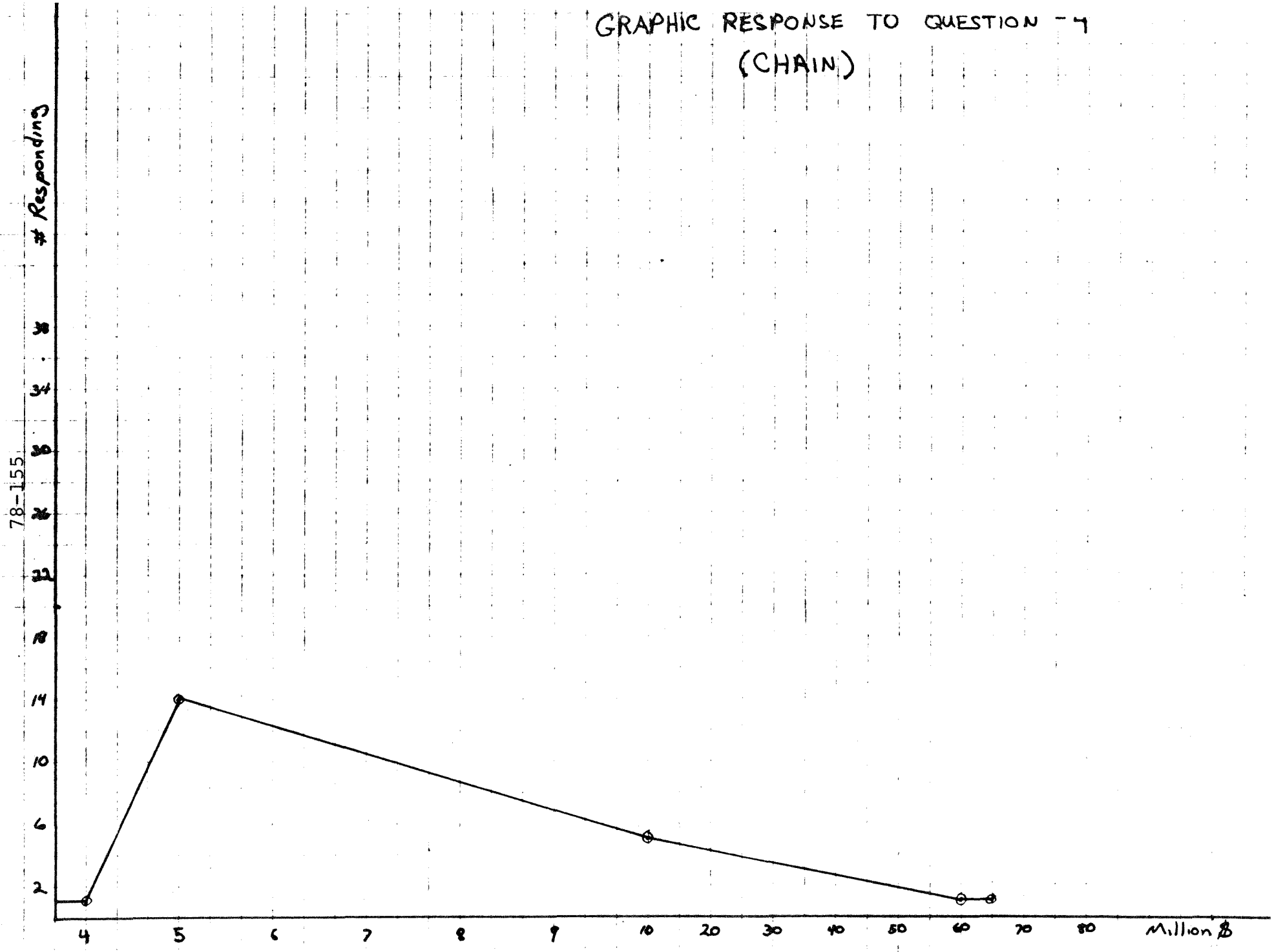
Question 4: **Amount of Liquor Liability coverage you are presently carrying _____$.**

Amount of Liquor Liability Coverage - $	# of Respondents
$ 0	19
$ 9,000	1
$ 25,000	1
$ 50,000	5
$ 100,000	12
$ 200,000	1
$ 250,000	4
$ 300,000	38
$ 500,000	21
$ 1,000,000	35
$ 1,300,000	2
$ 1,500,000	7
$ 2,000,000	8
$ 2,300,000	1
$ 2,500,000	2
$ 2,700,000	1
$ 3,000,000	4
$ 3,300,000	1
$ 3,500,000	1
$ 4,000,000	1
$ 5,000,000	14
$10,000,000	5
$26,000,000	1
$60,000,000	1
$75,000,000	1

GRAPHIC RESPONSE TO QUESTION #4
(INDIVIDUAL UNIT)



GRAPHIC RESPONSE TO QUESTION - 4
(CHAIN)



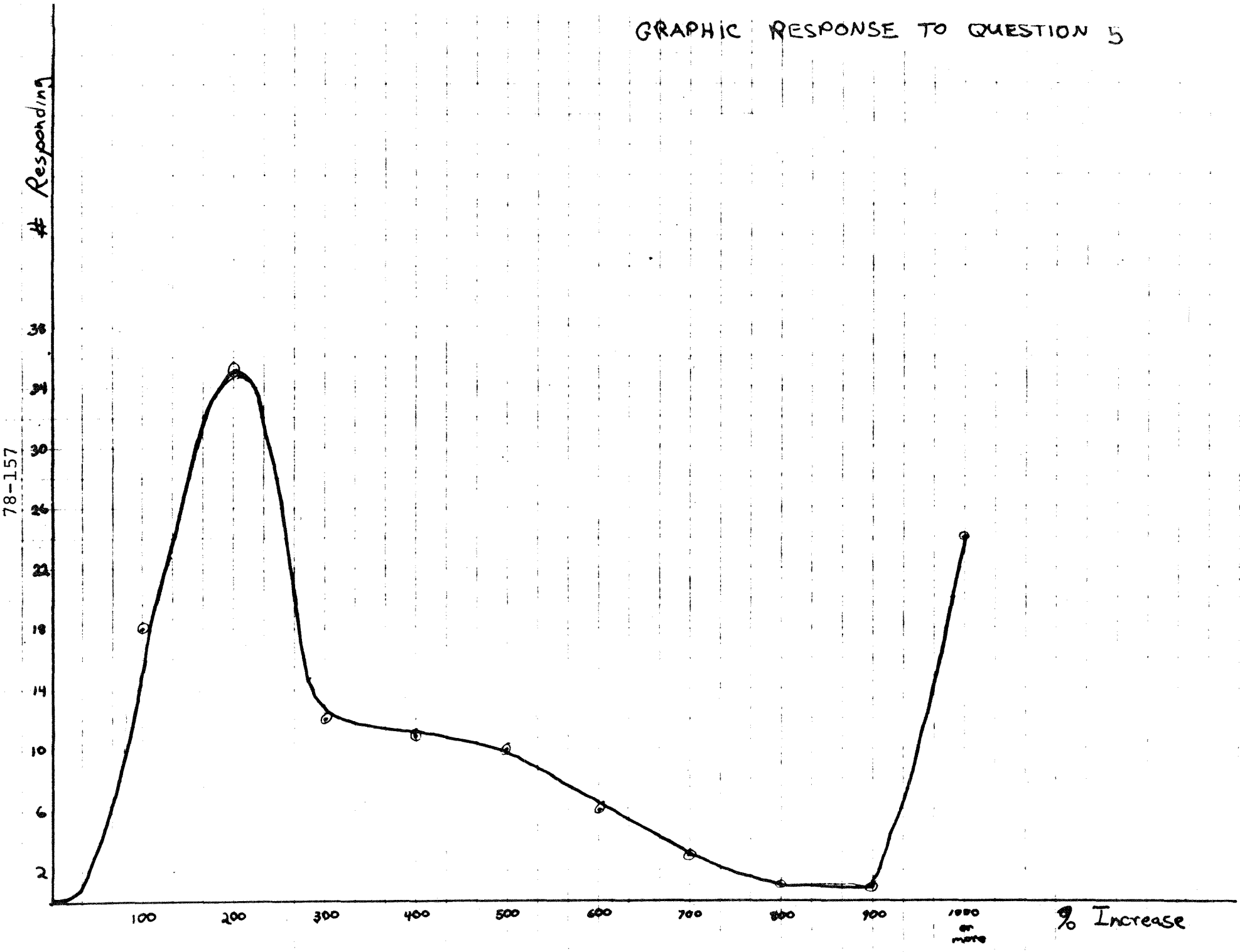
78-155

78-156

Question 5: Approximate percentage of increase in your Liquor Liability premiums over the past five years ____%.

Liability Insurance Premium Increase %	# of Respondents
15%	1
20%	1
30%	1
50%	18
75%	1
100%	18
150%	1
200%	35
300%	12
400%	11
450%	1
500%	10
600%	6
700%	3
800%	1
900%	1
1000%	6
Greater than 1000%	18

GRAPHIC RESPONSE TO QUESTION 5



78-157

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RESPONSES TO QUESTION #7.

"Other than Liquor Liability insurance, what do you feel is (are) the most pressing problem(s) facing on-sale licensees today?"

No. Making Comment	
10	High overhead
10	Responsibility of judgement of intoxication
10	Over regulation by government
9	All-around insurance costs
8	Minors ordering drinks
8	Minimum wage
6	ABC Pilot Project
5	Laws concerning serving of minors
5	How to determine intxociated
5	3rd Party Liquor Liability
4	High taxes
3	Alcoholic beverage license costs
3	How to stop serving a customer
3	Fair trade laws
3	Finding good honest employees
3	Dis-continuity of ABC & Health Department Enforcement
3	False Identification
3	No tip credit
2	Difficulty in obtaining general licenses
2	Regulatory agencies
2	Education of employees about liquor liability
2	ABC Autocracy
1	Vagueness of "obviously intoxicated"
1	Conditional use permits
1	Over issuance of licenses
1	Personal property tax on inventories
1	Illegality of discount for large liquor purchases
1	Broken glass in parking lost from liquor sneaked out
1	Unemployment insurance
1	Change of blood intoxication level
1	Bad public image of licensees
1	Setting up mutual liquor liability insurance company
1	Abuse by ABC
1	Water Shortage
1	Medical insurance for employees
1	Bad business climate in California
1	Property taxes
1	Insurance companies that settle too easily
1	Tort reform
1	Harrassment of customers by law enforcement
127	

RESPONSES TO QUESTION #8

"Which, if any, of the ABC Regulations do you feel are too restrictive or burdensome?"

No. Making Comment	
11	Responsibility of intoxication judgement by restaurateur
7	ABC Pilot Project
4	Non-liability for employees
4	Laws concerning serving to minors
3	Responsibility for parents giving wine/liquor to minor children
3	Restrictions on In-store promotion of alcohol
3	3rd party liquor liability
3	Age restriction of cocktail waitresses
2	Restrictions on marrying well and wine bottles
2	Dis-continuity of enforcement by ABC and Health Departments
2	Over restrictive government regulations
2	Controls on advertising
1	Stamp by licensee on liquor bottles
1	Non-issuance of licenses within 100 ft. residence
1	Drinking hours
1	Tax posting regulations
1	1% of billing late charge
1	S.B. #354
1	Red tape in license transfer procedures
1	Drinking age of 21
1	Mailing license to Sacramento when closed 10 or more days
1	Obtaining licenses
1	Listing of house wine brand names
57	

RESPONSES TO QUESTION #12

"Fron the licensee's viewpoint, toward what areas should the Association be directing more of its efforts? Please explain:"

No. Making Comment	
50	Elimination of 3rd party liquor liability
13	Limitations on liquor liability suit awards
9	Lower liquor liability insurance premiums
8	Controlling ABC & Health Departments
7	Relaxation of regulation by government
6	Improving public image as responsible dispensers
5	Expanded lobbying in general
5	Re-establishment of tip credit
4	Enlightening ABC as to restaurateur's position
3	Changing the evaluation basis for liquor liability insurance premiums
3	Education of employees about liquor liability
2	Minimum Wage Control
2	More detailed explanation of pending legislation
2	More liquor liability & training programs
2	Increasing liquor license availability
2	Lowering drinking age
2	Forming mutual liquor liability insurance plan
1	Education of East Side & Chinatown
1	Truth in Menu citation control
1	Exchanging of ideas
1	Educational seminars
1	Generating local statistics
1	Alcohol education for young people
1	Increasing criminal penalties for the drunk driver
1	Increasing criminal penalties for use of false I.D.'s
1	Promoting membership in the CDBA
1	Legal assistance for the restaurateur
1	Changing state laws on insurance
136	

ADDITIONAL COMMENTS

No. Making Comments	
5	Formation of this council is a great idea
2	Need for a panel of restaurateurs to test equipment and publish results
1	Need for availability of multi-lingual bulletin service
1	Liability should be on actual server (waitress, bartender)
9	

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THE FOOD AND ALCOHOL BEVERAGE SERVICE INDUSTRIES

SEVEN SOUTHERN CALIFORNIA COUNTIES AND STATE OF CALIFORNIA

The sales shown on this chart reflect only taxable retail sales which are attributable to businesses in which the primary function is foodservice (designated as "separate eating and drinking places"). The total, therefore, does not include non-taxable transactions, nor foodservice sales within other types of retail stores (drugstores, department stores, etc.), hotels or motels, many recreation facilities, institutions, etc. The total does include sales of in-plant feeding facilities or similar operations in which the food operation is a business separate from the facility in which it is located. (NOTE: 1972 sales figures reflect "catch up" menu price adjustments during Phase II of price controls and inclusion of "hot food to go" under taxable sales effective 1-1-72 as well as the natural sales growth of the industry.)

According to the National Restaurant Association, the estimated 1976 U.S. sales of "separate eating and drinking places" totaled $51.8 billion which represented approximately 66 percent of the total sales of public eating establishments and institutions (categories as shown in the NRA Washington Report, 3-27-78). If "separate eating and drinking places" account for 66 percent of California's foodservice sales, the 1977 total California foodservice sales would have been in excess of $11.8 billion.

(NOTE: This figure still would not include the retail value of "Commercial Equivalent Potential" of foodservice in military services, correctional institutions, federal hospitals, state and local "short-term" hospitals, boarding homes, or homes for the blind, orphans, mentally and physically handicapped, etc.)

SOURCE: Sales Tax Permits and Taxable Sales: "Taxable Sales in California," prepared by Statistical Research and Consulting Division, State Board of Equalization, State of California (Quarterly Reports). Number of permits is the number reported as of July 1 of each year. Dollar volume is the total for the year reported for the "eating and drinking group."

COUNTY	1960 PERMITS	1960 TAXABLE SALES (ADD 000)	1965 PERMITS	1965 TAXABLE SALES (ADD 000)	1970 PERMITS	1970 TAXABLE SALES (ADD 000)
Los Angeles	12,301	$ 661,027	13,735	$ 911,680	14,012	$1,230,173
(% change)			11.7%	37.9%	2.0%	34.9%
Orange	1,146	79,824	1,787	156,162	2,346	262,376
			55.9%	95.6%	31.3%	68.0%
Riverside	797	31,438	870	49,276	982	74,663
			9.2%	56.7%	12.9%	51.5%
San Bernardino	1,223	42,130	1,329	64,501	1,369	97,898
			8.7%	53.1%	3.0%	51.8%
San Diego	1,929	87,738	2,159	119,532	2,421	216,609
			11.9%	36.2%	12.1%	81.2%
Santa Barbara	333	21,260	433	31,672	516	47,933
			30.0%	49.0%	19.2%	41.9%
Ventura	419	17,664	539	30,170	629	47,600
			28.6%	70.8%	16.7%	57.8%
TOTAL STATE OF CALIFORNIA	35,311	1,713,498	38,392	2,401,664	40,445	3,408,101
			8.7%	40.2%	5.3%	41.9%

	1971		1972*		1973	
Los Angeles	13,987	$1,289,625	14,282	$1,510,244	14,326	$1,669,730
(% change)	(.2%)	4.8%	1.9%	17.1%	.3%	10.6%
Orange	2,381	287,819	2,515	356,057	2,535	415,624
	1.5%	9.7%	5.6%	23.7%	.8%	16.7%
Riverside	971	79,960	984	94,375	1,006	107,408
	(1.1%)	7.1%	1.3%	18.0%	2.2%	13.8%
San Bernardino	1,410	106,612	1,445	125,448	1,455	139,660
	3%	8.9%	2.5%	17.7%	.7%	11.3%
San Diego	2,480	236,794	2,547	287,143	2,614	332,831
	2.4%	9.3%	2.7%	21.3%	2.6%	15.9%
Santa Barbara	533	51,555	547	57,389	547	64,287
	3.3%	7.6%	2.6%	11.3%	0%	12.0%
Ventura	633	51,976	670	61,561	685	71,505
	.6%	9.2%	5.8%	18.4%	2.2%	16.2%
TOTAL STATE OF CALIFORNIA	40,765	3,623,456	41,711	4,279,013	42,129	4,839,625
	.8%	6.3%	2.3%	18.1%	1.0%	13.1%

*See explanatory notes on cover sheet.

COUNTY	1974 PERMITS	1974 TAXABLE SALES (ADD 000)	1975 PERMITS	1975 TAXABLE SALES (ADD 000)	1976 PERMITS	1976 TAXABLE SALES (ADD 000)
Los Angeles	14,169	$1,864,545	14,376	$2,031,358	14,690	$2,265,382
(% change)	-1.1%	11.7%	1.5%	8.9%	2.2%	11.5%
Orange	2,642	486,753	2,813	557,543	2,993	650,495
	4.3%	17.1%	6.5%	14.5%	6.4%	16.7%
Riverside	1,012	119,068	1,051	136,170	1,095	157,887
	0.6%	10.9%	3.9%	14.4%	4.2%	15.9%
San Bernardino	1,450	158,523	1,441	174,879	1,457	198,661
	-0.3%	13.5%	-.6%	10.3%	1.1%	13.6%
San Diego	2,646	383,907	2,762	434,681	2,914	502,275
	1.2%	15.3%	4.4%	13.2%	5.5%	15.6%
Santa Barbara	560	73,592	574	83,679	584	94,387
	2.4%	14.5%	2.5%	13.7%	1.7%	12.8%
Ventura	679	83,203	691	94,914	722	109,572
	-0.9%	16.3%	1.7%	14.1%	4.5%	15.4%
TOTAL STATE OF CALIFORNIA	42,245	5,447,680	43,165	6,098,509	44,459	6,895,356
	0.3%	12.6%	2.2%	11.9%	3.0%	13.1%

	1977					
Los Angeles	14,970	$2,536,755				
(% change)	1.9%	11.8%				
Orange	3,191	726,704				
	6.6%	11.7%				
Riverside	1,150	189,774				
	5.0%	20.2%				
San Bernardino	1,497	237,808				
	2.7%	19.7%				
San Diego	3,123	581,397				
	7.1%	15.8%				
Santa Barbara	595	109,288				
	1.9%	15.8%				
Ventura	742	125,622				
	2.7%	14.6%				
TOTAL STATE OF CALIFORNIA	45,897	7,841,589				
	3.2%	13.7%				

POPULATION TRENDS

SEVEN SOUTHERN CALIFORNIA COUNTIES AND STATE OF CALIFORNIA

COUNTY	1960 POPULATION	1970 POPULATION	1975 PROJECTED POPULATION ESTIMATES	1980 PROJECTED POPULATION ESTIMATES
Los Angeles (% change)	6,042,686	7,036,887 (16.5%)	6,947,200 (-1.27%)	7,142,300 (2.8%)
Orange	703,925	1,420,386 (101.8%)	1,713,400 (20.6%)	1,938,800 (3.2%)
Riverside	306,191	459,074 (49.9%)	525,200 (14.4%)	626,800 (19.4%)
San Bernardino	503,591	684,072 (35.8%)	696,800 (1.9%)	780,000 (11.9%)
San Diego	1,033,011	1,357,854 (31.4%)	1,594,100 (17.4%)	1,804,100 (13.2%)
Santa Barbara	168,962	264,324 (56.4%)	281,100 (6.4%)	298,500 (6.2%)
Ventura	199,138	376,430 (89.0%)	440,700 (17.1%)	503,400 (14.2%)
TOTAL STATE OF CALIFORNIA	15,717,204	19,953,134 (27.0%)	21,198,100 (6.2%)	22,798,900 (7.6%)

SOURCE: Population Figures - U. S. Bureau of Census (1960 & 1970)
- Department of Finance, Population Projections for California Counties (1975 & 1980)

Courtesy of:

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STATISTICS
CALIFORNIA FOOD SERVICE INDUSTRY
(1977)

I. Number of Units

A.	Separate eating & drinking places (per capita: 475)*	45,897	
B.	Drug, Dept. & Variety Stores with food service	3,500	(estimate)
C.	Hotels, & Motels with food service	2,900	(estimate)
D.	Elementary Schools, High Schools and Colleges	7,700	(estimate)
E.	Hospitals, Rest Homes and other institutions	1,700	(estimate)
	TOTAL	61,697	

II. Sales

A.	Separate eating & drinking places (per capita: $359.37)*	$ 7,841,589,000	
B.	Other commercial food service operations	2,124,000,000	(estimate)
C.	Retail value or commercial equivalent potential of schools, government feeding, etc.	1,888,000,000	(estimate)
	TOTAL	$11,853,589,000	

II. Food and Drink Purchases: $4.1 billion (estimate)

IV. Number of foodservice employees

A.	Separate eating and drinking places	430,000	
B.	Hotels, Motels, and all others	175,000	(estimate)
	TOTAL	605,000	

V. Payroll:

A.	Separate eating and drinking places	$ 2,190,000,000	
B.	All others	2,400,000,000	(estimate)
	TOTAL	$ 4,590,000,000	

* * * * * * * * *

DATA SOURCE: 1) "Taxable Sales in California," State Board of Equilization

2) Employment Data and Research Section, State of California, Employment Development Department

3) National Restaurant Association

*Based on population estimate of 21,820,000

Compiled by:

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I. SALES TAX PERMITS

On July 1, 1977, there were 45,897 sales tax permits issued by the State Board of Equalization to "eating and drinking places" in California. In 1977, food and alcohol beverage sales of this group totaled $7,841,589,000. This total, representing 7.88% of all taxable transactions in the State of California, made the food and alcohol beverage service industries the fourth largest collector of sales tax in the State, exceeded only by department and dry goods stores (8.46%), new motor vehicle dealers (10.05%) and service stations (8.74%). NOTE: The true percentage (and perhaps the ranking) is actually higher because these figures do not include foodservice operations within other types of retail stores (drug stores, department stores, etc.), hotels or motels, many recreation facilities, institutions, etc.

Source: "Taxable Sales in California," (Sales and Use Tax), State Board of Equalization 1977 Annual Report, May, 1978.

II. EMPLOYMENT AND PAYROLLS

The food and alcohol beverage service industry is the State's largest retail trade employer. The number of "eating and drinking places" reporting under the California Unemployment Insurance Act totaled 25,995 in the first quarter 1977. This figure does not include restaurants in hotels, department stores, etc. or business establishments that do not employ any employees subject to the California Unemployment Insurance Act (self-employed "Mom & Pop" operations).

In march 1977, the number of employees in "eating and drinking places" reporting under the California Unemployment Insurance Act totaled 428,880.

In comparison, the building materials and garden supplies industry totaled 52,174; general merchandise stores 213,244; food stores 203,167; automotive dealers and service stations 179,975; apparel and accessory stores 86,653; furniture and home furnishings stores 60,684; and miscellaneous retail 185,078. NOTE: These figures do not include self-employed individuals. The only industry groups that employ more people are health services (461,289), and governments (1.7 million) --- and even these groups include many foodservice employees.

The total annual wages for the 25,995 "eating and drinking place" establishments reporting would be approximately 2.2 billion dollars (projected from the first quarter 1977 wages of $505,984,555). Again, these figures do not include income of self-employed individuals.

In the first quarter, 1977, the number of "Hotels, Motels, and Tourist Courts" reporting under the California Unemployment Insurance Act, and their number of employees, were 3,776 and 90,146 respectively. A conservative estimate of the number of food and beverage employees in these operations and their annual wages would be 38,000 and $220 million respectively.

Source: California Employment and Payrolls, January - March 1977; Employment Development Report 127; 5-19-78.

III. HEALTH PERMITS

A clearer picture as to the number of restaurants of all types including those in stores, hotels, etc., may be obtained by looking at the "restaurant" inventory" (based on helath permits) of the California Department of Health.

The Department's estimate is derived from a projection based on the ratio of the number of restaurants to population in the 22 counties participating in the State-Wide Environmental Evaluation Program Systems (SWEEPS). The twenty-two counties have a known inventory of 47,564 restaurants and population of 16,539,800. The State population is 21,206,000; thus the State Department of Health estimates the total number of restaurants in the State to be 60,983.

$$\frac{X \text{ (total restaurants)}}{21,206,000} = \frac{47,564}{16,539,800}$$

Source: California Department of Health; Local Environmental Health Programs Section, October 1977.

IV. ON-SALE ALCOHOLIC BEVERAGE LICENSES

As of April 1, 1977, the number of various on-sale licenses issued by the California Department of Alcoholic Beverage Control was as follows:

6,850	on-sale general licenses (bona fide public eating place)
4,432	on-sale general licenses (public premises)
8,065	on-sale beer and wine licenses (bona fide public eating place)
2,014	on-sale beer and wine licenses (public premises)
5,487	on-sale beer licenses (with food)
223	on-sale beer licenses (public premises)
1,207	various club licenses*
28,278	TOTAL

*Club license details:

117	special on-sale general licenses (clubs)
79	on-sale general for clubs (no longer issued)
708	club licenses (fraternal clubs, etc.)
303	veterans club licenses
1,207	TOTAL

NOTE: These totals do not include seasonal licenses, special on-sale licenses for transportation facilities (ships, trains, airplanes, etc.) nor temporary on-sale licenses issued by the Department.

Source: California Department of Alcoholic Beverage Control; Report of Number of On-Sale Alcoholic Beverage Licenses as of April 1, 1977.

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	Permits	Taxable Sales Add 000	% of Total	% Change	Per Capita
1967					
Eating/No Alcohol Beverages	18,833	$1,082,937	3.08	3.7	$ 55.44
Eating/Beer & Wine	11,360	408,328	1.16	5.0	20.90
Eating & Drinking/All Types Liquor	8,995	1,259,819	3.59	7.8	64.49
Total	39,188	2,751,084	7.83	5.7	140.83
1968					
	18,828	1,149,431	2.95	6.1	58.10
	11,474	438,147	1.12	7.3	22.15
	9,225	1,360,801	3.49	8.0	68.79
	39,527	2,948,379	7.56	7.2	149.04
1969					
	19,140	1,246,319	2.94	8.4	62.77
	11,582	470,949	1.11	7.5	23.72
	9,303	1,483,943	3.50	9.0	74.74
	40,025	3,201,211	7.55	8.6	161.23
1970					
	19,427	1,337,723	3.09	7.3	66.87
	11,572	499,219	1.16	6.0	24.96
	9,446	1,571,159	3.64	5.9	78.55
	40,445	3,408,101	7.89	6.5	170.38
1971					
	19,492	1,419,524	3.03	6.1	70.05
	11,696	539,435	1.15	8.1	26.62
	9,577	1,664,497	3.56	5.9	82.14
	40,765	3,623,456	7.74	6.3	178.81
*1972					
	20,234	1,770,525	3.30	24.7	86.27
	11,865	668,294	1.24	23.9	32.56
	9,612	1,840,194	3.43	10.6	89.66
	41,711	4,279,013	7.97	18.1	208.49
1973					
	20,315	2,020,965	3.27	14.1	97.44
	12,018	763,879	1.24	14.3	36.83
	9,796	2,054,781	3.33	11.7	99.07
	42,129	4,839,625	7.84	13.1	233.34
1974					
	20,090	2,250,498	3.30	11.4	107.51
	12,235	875,631	1.29	14.6	41.83
	9,920	2,321,551	3.41	13.0	110.90
	42,245	5,447,680	8.00	12.6	260.24
1975					
	20,400	2,509,244	3.41	11.5	118.85
	12,707	1,011,880	1.38	15.6	47.93
	10,058	2,577,385	3.51	11.0	122.07
	43,165	6,098,509	8.30	11.9	288.85

	Permits	Taxable Sales Add 000	% of Total	% Change	Per Capita
1976					
	21,152	2,844,056	3.39	13.3	132.46
	13,121	1,163,102	1.39	14.9	54.17
	10,186	2,888,198	3.45	12.1	134.52
	44,459	6,895,356	8.23	13.1	321.15
1977					
	21,928	3,202,799	3.22	12.6	146.78
	13,664	1,371,865	1.38	17.9	62.87
	10,305	3,266,925	3.28	13.1	149.72
	45,897	7,841,589	7.88	13.7	359.37

*In 1972, gasoline at service stations and hot food "to go" became subject to sales tax; price increases following price controls showed their full effect.

SOURCE: "TAXABLE SALES IN CALIFORNIA"
Prepared by the Statistical Research and Consulting Division
State Board of Equalization, Box 1799
Sacramento, California 95808

Compiled by:

Southern California Restaurant Association
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SALES TAX REVENUE TO STATE & LOCAL GOVERNMENTS @ 6%*

	1974	1975
Eating/No Alcohol Beverages	$135,029,880	$150,554,640
Eating/Beer & Wine	52,537,860	60,712,800
Eating & Drinking/All Types Liquor	139,293,060	154,643,100
TOTAL	$326,860,800	$365,910,540

	1976	1977
Eating/No Alcohol Beverages	$170,643,360	$192,167,940
Eating/Beer & Wine	69,786,120	82,311,900
Eating & Drinking/All Types Liquor	173,291,880	196,015,500
TOTAL	$413,721,360	$470,495,340

*Combined state & local sales tax increased from 5% to 6% 7-1-73. Some counties have a 6½% combined rate for rapid transit district purposes. This chart shows calculations at 6% of the state totals for the years indicated.

NOTE: The sales tax revenue from food and beverage sales in hotels, department stores, recreation centers, etc., etc., are not reflected in these figures. The Association estimates that such sales in 1977 were approximately $2.1 billion which would have meant sales tax of $126 million.

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CALIFORNIA LIQUOR TAXES

Fiscal Year 1976-77

(Figures do not include state and local sales taxes)

1. Liquor - $105,000,000
2. Beer - $ 20,000,000
3. Wine - $ 2,250,000

(Source - State Dept. of Business Taxes)

Note: According to the trade publication Beverage Bulletin, 30% of the above taxes can be attributed to on-sale licensees.

Source: Second Annual Tableservice Restaurant Operations Report '77, National Restaurant Association/ Laventhol & Horwath

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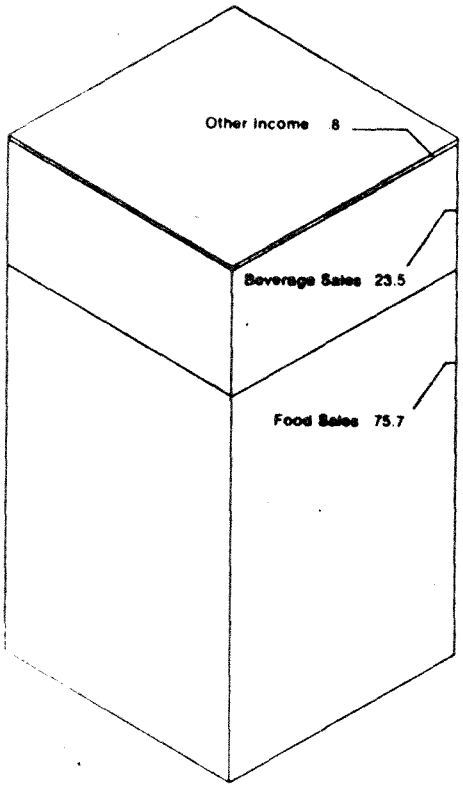
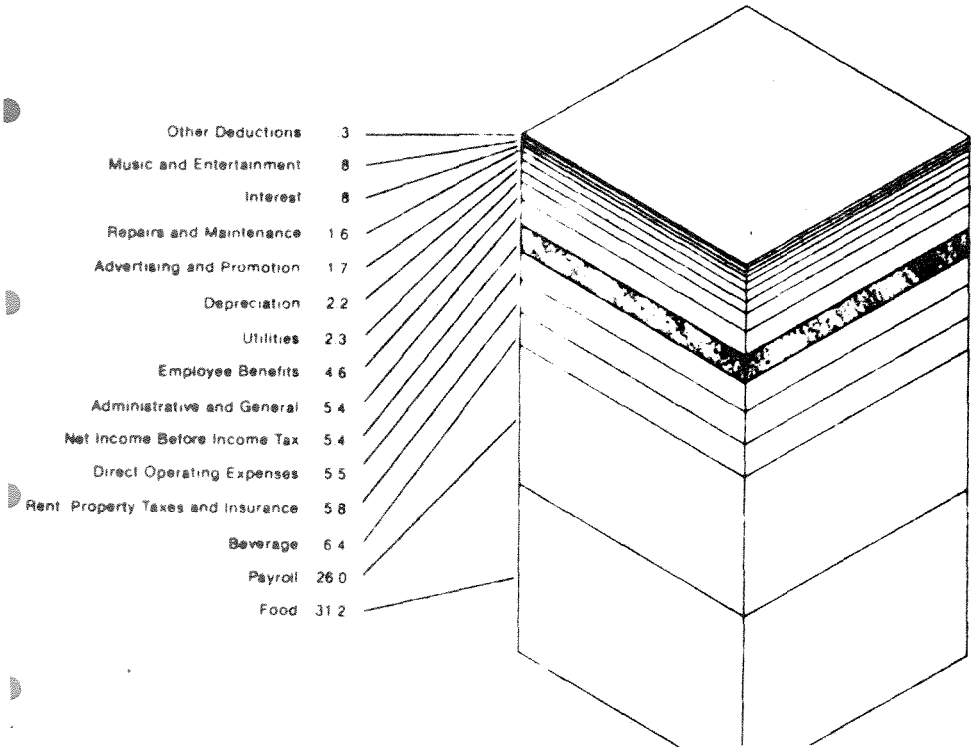
The Restaurant Industry Dollar

A slight increase in the portion of total revenue derived from beverage sales and a sharp rise in other income were the major variations in the source of the restaurant dollar in 1976 compared with 1975. The average (mean) ratios of major revenue and expense categories for all restaurants for 1976 and 1975 are shown in the accompanying table and chart.

There were a few significant variations in the distribution of the industry dollar. The portion spent for music and entertainment expense rose by over 14 percent, administrative and general expenses required nearly 15 percent more and the utilities portion was up nearly 5 percent. Occupation costs also took a greater slice of the dollar with the change in interest being the greatest at 14 percent. The increase in rent, property taxes and insurance was in property taxes. On the lower side were the portions of the dollar going to advertising and promotion, repairs and maintenance and other deductions. Payroll and related expenses also took a slightly larger slice since the 2 percent drop in cash payroll was offset by an increase of 21 percent in related payroll taxes and other benefits.





Where it Came From

	1976	1975	Increas (Decreas
Food Sales	75.7¢	76.2¢	(
Beverage Sales	23.5	23.2	1
Other Income	.8	.6	33

Where it Went

Cost of Merchandise Sold			
Food	31.2¢	31.6¢	(1
Beverage	6.4	6.1	4
Total	37.6¢	37.7¢	

Payroll and Related Expenses			
Payroll	26.0¢	26.6¢	(2
Employee Benefits	4.6	3.8	2
Total	30.6¢	30.4¢	

Direct Operating Expenses	5.5¢	5.4¢	
Music and Entertainment	.8	.7	1
Advertising and Promotion	1.7	1.8	(
Utilities	2.3	2.2	
Administrative and General	5.4	4.7	1
Repairs and Maintenance	1.6	1.7	(

Occupation Costs			
Rent, Property Taxes and Insurance	5.8	5.7	
Interest	.8	.7	1
Depreciation	2.2	2.2	

Other Deductions	.3	.6	(5
[redacted]			
Net Income Before Income Tax	5.4	6.2	(12

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California Restaurant Operations 1977 Edition

3rd Annual Report on Restaurant Operations in California

This report was prepared with the cooperation of the Laventhol & Horwath Offices in:

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Introduction

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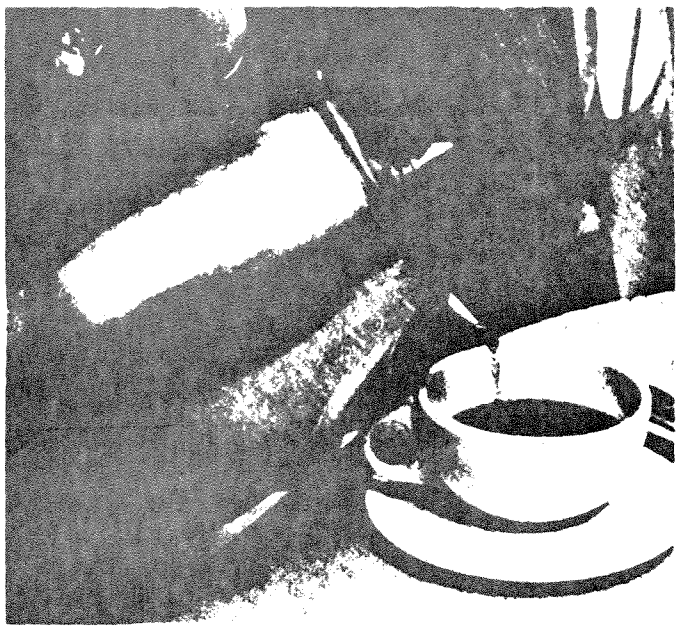
In Laventhol & Horwath's third annual report on restaurant operations in California, we present the year-to-year financial comparisons of both dinner houses and coffee shops with the results of the *Tableservice Restaurant Operations Report '77*. That study of full-time service operations from across the United States was prepared by Laventhol & Horwath and published by the National Restaurant Association.

This report contains detailed breakdowns of the information obtained from small and medium-size coffee shop chains in California. In addition to three location categories and three levels of total food and beverage sales, breakdowns for coffee shops include:

- **Profitability** — the results of operations reporting net income before income tax are compared with those reporting losses.
- **By status of space occupied** — building owned or building leased.
- **Number of years in operation** — under 2 years, between 2 years and 4.9 years, between 5 years and 9.9 years, or 10 years and over.

In this year's study, we present an analysis of the number of persons employed, full and part-time, and sales per employee for both dinner houses and coffee shops. The details of certain controllable expenses for the entire sample are also compared with the *Tableservice Restaurant Operations Report '77*.



The Restaurant Study

In addition to the historical information presented in this report, we are departing from our traditional format by offering our predictions concerning developments in the California restaurant industry. We foresee that previously isolated innovations in current industry practices will become the norm over the next year or so. We offer these predictions in our section entitled "Laventhol & Horwath's Five Significant Industry Predictions."

The reader is cautioned that the average operating results and percentages are not to be considered standards for the industry, nor are they necessarily attainable or desirable goals. However, they can be considered guidelines for comparison with the results of your own operation, and a worksheet for that purpose has been provided, following the text and schedules.

For those who may not be familiar with all of the industry terminology and the accepted methods for calculating operating ratios, we have included an addendum to this report, "Using Restaurant Financial Ratios and Analysis," which is a chapter from the book *Profitable Restaurant Management*, by Kenneth I. Solomon and Norman Katz, published by Prentice-Hall, Inc. For additional information concerning the terminology and structure of the restaurant accounting system, we refer the reader to the *Uniform System of Accounts for Restaurants*, published by the National Restaurant Association.

Industry Outlook

Long considered as innovators and industry leaders, California restaurateurs constantly strive to keep pace with the public's evolving tastes. Changes in industry regulations, life styles and increased costs, are among the factors contributing to the challenge California restaurateurs face to provide quality food and service.

The new regulations concerning tip credit and minimum wage, enacted over a year ago, have impacted on various facets of the food service industry. Peter Soracco, owner/operator of both the Fiasco and the Jumping Frog Saloon, comments that "the impact was not as great as originally anticipated since the higher costs were passed on to the patron through increased menu prices." He also states that the "legislature missed the boat when one considers that our industry is a major employer of minorities and young people." As the minimum wage increases, payroll cuts will result. Al Levie, owner of Gulliver's Restaurants, concurs that a key to survival is the restaurateurs' ability to raise menu prices, but states the "California position is inequitable in relation to other states. It hit the industry too hard, too fast and is difficult to adjust to."

Changing social patterns and West Coast lifestyles are affecting California restaurants. As more women are working outside the home and as families have fewer children, less time is devoted to meal preparation. According to Steve Zimmerman, Executive Vice President of Zim's Restaurants, "There is a direct correlation between the increased percentage of women in the labor force and the increased revenue in the restaurant industry."

While changing lifestyles are occurring throughout the nation, "people on the West Coast continue to be more weight conscious than those in the East," says Wally Ganzi, proprietor of The Palm Restaurant. "We serve the same size portion in our California operation as in our New York establishment, and have found that, while it is sufficient for our New York patrons, it is over-sized for West Coast diners." Other restaurants, such as the Fiasco and the Jumping Frog Saloon, also provide large portions since their management believes that "the satisfied customer does not walk out hungry."

Food product availability in California results in a mixed bag of options. Wally Ganzi finds "the produce cost, quality and virtual year-round availability to be an excellent advantage here in California. However, the distance from the seafood and meat production centers places a strain on the quality available to California restaurateurs."

California restaurateurs also face the problem of third party liquor liability insurance costs. "As insurance rates continue to reduce profit margins, and menu prices rise to off-set increased expenses, California restaurants face a challenge," says Robert Freeman, Executive Vice President of Victoria Stations, Inc. California restaurateurs are concerned that while it is possible for management to discern the obviously intoxicated individual, how do they identify the potentially hazardous patron? Additionally, as a result of the spiraling cost of this type of insurance, a significant number of the smaller or "mom and pop" operations are taking the risk of operating without coverage. It is Al Levie's contention that "at some point a limit will have to be set regarding liability."

Faced with the unique challenges found in the California restaurant industry, restaurateurs must continue to be sensitive to the ever-changing climate of public tastes, social patterns and industry regulations. According to Robert Freeman, "California restaurateurs will have to increase their awareness of the market, competitors and operating procedures in the coming years."

Laventhol & Horwath's Five Significant Industry Predictions

For a number of years, California has been regarded as a pace setter for emerging trends in the restaurant industry. Normally, these trends have been fairly well acknowledged by the industry prior to inclusion in our reports. Because Laventhol & Horwath is involved with many restaurants at the development stage, we often gain a perspective of emerging factors not yet sufficiently developed to be considered trends.

Beginning with this year's *California Restaurant Operations*, we have incorporated some of our restaurant industry specialists' observations as informal predictions. We believe that each of the predictions is likely to become more visible or possibly solidify as a genuine trend within the next one to two years. Based on our observations, we offer this year's five predictions:

1. **"Chefs"** will begin to return to dinner house kitchens in sufficient numbers to displace the "broilerman" as the key kitchen employee. We use the term "chef" to identify employees with technical and/or professional training in the culinary arts. The return to the use of chefs is due, in part, to the high degree of competition in California. This competition is prompting progressively more dinner houses to offer increasingly intricate and attractive food presentations which are beyond the scope of knowledge of most skilled broilermen. Since very few culinary education programs exist on the West Coast, California restaurateurs will begin actively recruiting their chefs from the growing numbers of programs in the Midwest and East. As an alternative to such sophistication, some chains may opt for out-of-state expansion, thereby retaining the simplicity in preparation and presentation that has been their trademark.

2. The **"Mega-Restaurant"** will become a commonplace California restaurant industry term as the number of restaurants of over 10,000-square feet (not including specialized banquet space) increases dramatically. Most of these restaurants will combine several food and beverage concepts under one roof, thus taking advantage of the economies inherent in shared management and shared preparation facilities. Among the operators who will be attracted to the "Mega-Restaurant" are those who now say, "If I don't have the capacity to approach three million dollars in sales, I am not sure it is worth it."

3. The **terms** "fast food," "coffee shop," and "dinner house" will gradually lose meaning as definitive descriptions. Presently, at least two California-based chains have integrated a menu containing coffee shop items into a dinner house environment, thereby successfully tapping both markets. Similarly, a number of fast food chains now feature a product line competitive with coffee shops. The next step is the inclusion of modified table service. Additionally, some theme "dinner house" type restaurants have scaled down portion sizes and prices to compete in the $4.00 to $5.00 food-check range at dinner, while still providing dinner house decor and service.

4. Since competition through investment in decor and atmosphere has about peaked, limited menu operators will target **service** as a major area of emphasis. Now that an average priced limited menu restaurant meal costs close to the median in many continental restaurants, the public expects more than a waiter in shorts and tennis shoes who announces that he's prepared to be your "buddy" for the evening. While the historical friendliness of service in the limited menu restaurants will be maintained, it will be coupled with more professionalism.

5. **"Planned obsolescence"** will become a common term in the heavily themed area of the California restaurant business as operators begin to recognize that highly specialized themes may have a relatively short life. Such operations will be designed to facilitate "reconception" when sales progression falls behind normal growth; operators will be less inclined to wait until sales are down dramatically before making concept changes. To facilitate possible "reconception," a "theatre set" concept will be adopted by restaurant designers in the coming years.

In our next study, we will report on our predictions and offer our outlook for the following year.

The Restaurant Dollar

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Changes in the California minimum wage and tip credit and increases in the cost of doing business (which were forecast in last year's report) had a significant effect on the source and distribution of the revenue dollar in both dinner houses and coffee shops in 1976. In an effort to offset sharply higher payroll costs, coffee shops increased menu prices, curtailed advertising and rigidly controlled direct operating expenses. The effect was to increase the food sales portion of the revenue dollar and to sharply reduce the food cost portion. As a result, although payroll and related expenses, utilities, administrative and general and occupation costs all took larger portions of the dollar, net income before income taxes rose to 8.8 cents from 7.6 cents the year before.

Operators of full-service dinner houses were not as fortunate. Apparently faced with customer resistance to higher prices, they turned to merchandising the sale of alcoholic beverages, since that portion of the revenue dollar rose by 5 percent. However, higher payroll and related expenses, and increases in other operating expenses, were not offset by higher sales. As a result, net income before income tax dropped by one-third, from 11.7 cents a year ago to 7.8 cents. The restaurant dollars are compared below and operating results are analyzed in greater detail in the report which follows.

	CALIFORNIA RESTAURANTS				TABLE-SERVICE RESTAURANTS United States	
	Coffee Shops		Dinner Houses			
Where It Came From	**1976**	**1975**	**1976**	**1975**	**1976**	**1975**
Food sales	94.4¢	92.1¢	65.3¢	67.7¢	75.7¢	76.2¢
Beverage sales	5.4	7.4	33.3	31.6	23.5	23.2
Other income	.2	.5	1.4	.7	.8	.6
Where It Went						
Food cost[1]	29.4¢	34.0¢	28.1¢	30.1¢	31.2¢	31.6¢
Beverage cost[1]	1.4	2.2	9.7	8.6	6.4	6.1
Payroll and related expenses	34.0	31.0	28.8	26.1	30.6	30.4
Direct operating expenses	4.3	5.5	6.3	5.5	5.5	5.4
Music and entertainment	.1	.2	.7	1.9	.8	.7
Advertising and promotion	.7	1.8	1.2	.7	1.7	1.8
Utilities	2.9	2.7	1.5	1.5	2.3	2.2
Administrative and general	4.7	4.4	5.4	4.5	5.4	4.7
Repairs and maintenance	1.4	1.7	1.4	1.0	1.6	1.7
Rent, property taxes and insurance	9.0	6.4	6.3	6.3	5.8	5.7
Interest	.3	.2	.3	N	.8	.7
Depreciation	1.7	1.6	2.4	1.9	2.2	2.2
Other deductions	1.3	.7	.1	.2	.3	.6
Net income before income taxes	8.8	7.6	7.8	11.7	5.4	6.2

[1]Stated as ratios to total sales; see Exhibit 11 for ratios to department sales.
N — Negligible amount

MAJOR REGULATORY AGENCIES WITH WHICH THE FOOD & BEVERAGE SERVICE INDUSTRIES INTERACT:

1. CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL (State liquor laws and regulations). NOTE: To a lesser degree, some interaction with U. S. Treasury Department (Alcohol, Tobacco and Firearms Bureau).

2. CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS:

   A. INDUSTRIAL WELFARE COMMISSION and DIVISION OF LABOR STANDARDS ENFORCEMENT (State labor laws and regulations)

   B. DIVISION OF FAIR EMPLOYMENT PRACTICES (discrimination in employment)

   C. DIVISION OF INDUSTRIAL SAFETY (CAL/OSHA)

3. WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR (Federal labor laws and regulations).

4. City or County Health Departments (sanitation and consumer protection).

5. Local Fire Departments (fire safety; occupancy loads, etc.)

6. Local Building and Safety Departments -- (local construction standards, usually based on state laws and sometimes on state regulations, but with differing degrees of interpretation; new facilities and remodeling).

7. Taxing Authorities (audits, reports, regulations, etc.):

   A. STATE BOARD OF EQUALIZATION (sales tax)

   B. CALIFORNIA DEPARTMENT OF EMPLOYMENT (unemployment and disability insurance

   C. INTERNAL REVENUE SERVICE

   D. Local Business Licenses and Permits.

8. Others:

   A. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (federal)

   B. DEPARTMENT OF AGRICULTURE (federal)

   C. FOOD AND DRUG ADMINISTRATION (federal)

   D. NATIONAL LABOR RELATIONS BOARD (federal)

   E. FOOD & AGRICULTURE DEPARTMENT (state)

   F. FISH & GAME DEPARTMENT (state)

PROFILE OF FOODSERVICE INDUSTRY EMPLOYMENT

Attached are copies of National Restaurant Association's Economic Reports containing data regarding employment in the foodservice industry and "What Americans Drink." No attempt has been made to compile or estimate California data from these reports.

Some interesting highlights from the reports include:

1) Women account for nearly 69% of all specialized foodservice occupations.

2) Teenagers (ages 16 to 19) account for more than 31% of all specialized foodservice occupations.

3) Teenage employment has risen more than three times as fast as adult employment since 1972. This is generally attributed to the growth of fast-food operations and the tendency to part time employment of teenagers.

4) Employment growth in foodservice occupations has outpaced growth in total employment for five consecutive years (1972-1977); however, after three years in which the gain in foodservice employment was more than double that for total employment, the 1977 difference was narrowed to 4.5% foodservice and 3.5% total employment.

5) 1975 data indicates that almost 68% of separate eating and drinking places are establishments having only 1-9 employees; the proportion of establishments having 50 or more employees is 3.5% nationally (4.0% in California), but these account for more than one-fourth of the total number of employees. Establishments having 20 or more employees represent only 16% of the total establishments but employ 60% of the workers.

6) In 1976, approximately 56% of the workers in foodservice occupations were part time employees. This percentage has increased from 53% in 1975 and 51% in 1974.

7) Per capita consumption of non-alcoholic beverages rose 25% from 1955 to 1975, while per capita consumption of all alcoholic beverages rose 61% in the same period.

8) In 1975, alcoholic beverages accounted for nearly 11 billion dollars of total foodservice industry sales.

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ECONOMIC REPORT

Supplement to the Washington Report

NATIONAL RESTAURANT ASSOCIATION

April 10, 1978

USDA REVISES '78 FOOD PRICE HIKE TO 6-8 PERCENT

In response to a rapid rise in farm product prices as well as an increase in the overall rate of inflation, USDA has revised sharply upward its estimated gain for retail food prices this year. Raising the previously predicted gain of 4 to 6 percent, USDA is now looking for an increase of 6 to 8 percent.

Livestock prices, particularly the continuing high price of pork, are a key factor in the revision. USDA cautioned that its retail food price estimate could be raised further due to a number of possible developments including poor weather and government farm policy changes.

NRA's forecast for a menu price increase of about 7 percent, which was based in part on a projected increase in food costs of 4 to 6 percent, now also appears too low. The likelihood that our original estimate is now too low is strengthened by the evidence from the January and February Consumer Price Indexes showing prices of food away from home up 8.5 percent from the previous year. NRA will continue to monitor data on food and other costs in the coming months and will make any necessary adjustments in its forecast at midyear.

1977 FOODSERVICE EMPLOYMENT, MORE GROWTH, BUT AT SLOWER RATE

Foodservice, one of the nation's major employers of approximately 8 million persons according to an NRA survey, continued to outpace growth in overall employment last year. Included in the industry in 1977 were nearly 4.1 million persons in specialized foodservice occupations as well as 548,000 restaurant, cafeteria and bar managers, a recent Bureau of Labor Statistics report reveals. These data from the BLS 1977 Household Survey also show that the number of persons in specialized foodservice occupations rose 4.5 percent from the previous year, again outpacing overall employment growth of 3.5 percent.

In addition to the more than 4.6 million persons who are in specialized foodservice occupations (those depicted in the table below) or are managers, numerous others were employed by the foodservice industry in other capacities such as cashiers, bookkeepers and janitors.

It is noteworthy that the definitions used by the Bureau of Labor Statistics for their count of foodservice occupations tend to understate the actual number of persons employed in the foodservice industry as well. A person holding two jobs for instance, is counted by BLS at the job where he works the greatest number of hours. Thus, a part-time foodservice worker may not be enumerated as such if he holds another job for a greater number of hours.

Foodservice Occupations Gain 4.5% in 1977

Employment growth in foodservice occupations outpaced growth in total employment in 1977 for the fifth consecutive year, the only period for which comparable data are available. The difference in growth rates narrowed, however, as foodservice occupations gained 4.5 percent and total employment rose 3.5 percent in 1977 compared to gains in foodservice which were more than double those for total employment in the three previous years. This shift may be one sign of intensified efforts by operators to control labor costs in the face of rapidly rising average hourly earnings.

Last year the number of persons in specialized foodservice occupations reached nearly 4.1 million, a jump of 176,000 or 4.5 percent after increasing 7.7 percent in 1976. In addition, restaurant, cafeteria and bar managers numbered 548,000 in 1977, up 8.5 percent from the previous year.

The accompanying table shows the number of persons employed in foodservice occupations and as restaurant, cafeteria and bar managers in 1977 and percentage increased since 1972. Reflecting the trend toward limited menu restaurants, the fastest growth from 1972 to 1977 was among food counter and fountain workers. The slowest growth rate of 16.6 percent was posted for waiters and waitresses. It is noteworthy that the number of waiters and waitresses rose by a substantial 186,000 in the five year period, however.

Although women accounted for nearly 69 percent of foodservice occupations last year, growth in the number of males holding such jobs has outpaced that for women in recent years. Men are more likely than women to be waiters' assistants where they made up 77.6 percent of the total in 1977, dishwashers (69.6 percent) or bartenders (58.1 percent).

Foodservice Employment, 1977 and Percent Change 1977/1972

	Number of Workers, 1977	Percent Change 1977/76	Percent Change 1977/72
Restaurant, Cafeteria & Bar Managers			
Foodservice Workers			
Bartenders	548,000	+8.5%	+10.9%
Waiters' Assistants	4,095,000	+4.5%	+25.5%
Cooks	272,000	+4.2%	+35.3%
Dishwashers	192,000	+0.5%	+38.1%
Food Counter &	1,106,000	+3.9%	+27.7%
Fountain Workers	257,000	+2.4%	+17.9%
Waiters	454,000	+7.8%	+47.9%
Foodservice Workers	1,310,000	+4.1%	+16.6%
(n.e.c.)	505,000	+7.2%	+23.8%

Note: n.e.c. not elsewhere classified.
Source: *Employment and Earnings*, Bureau of Labor Statistics, NRA.

Women Predominate in Foodservice Occupations

Women jobholders are well represented in the foodservice industry accounting for 2.8 million or nearly 69 percent of those in specialized foodservice occupations and 190 thousand or 35 percent of restaurant, cafeteria and bar managers in 1977. In comparison women represented 40.5 percent of all employed persons and only 22.3 percent of all managers and administrators.

Foodservice occupations are an important source of employment for women accounting for about 8 percent of all jobs held by women. Of the 2.8 million women employed in specialized foodservice occupations the largest number, nearly 1.2 million, were employed as waitresses. Women are most prominent among waiter/waitresses accounting for more than 90 percent of the total and food counter and fountain workers where they make up nearly 86 percent of the total. On the other hand, women are least likely to be waiters' assistants or dishwashers.

It is noteworthy that women are becoming more prominent as both bartenders and waiters' assistants. While the number of male bartenders declined from 1976 to 1977, the number of females jumped nearly 19 percent. Women replaced men as waiters' assistants also as the number of females holding such jobs rose 10.3 percent from 1976 to 1977 while the number of males declined.

The continuing growth of women in foodservice occupations is primarily attributable to teens. While the number of teen females in foodservice jumped nearly 58 percent from 1972 to 1977, the number of adult females advanced by a much more modest 14 percent.

Women in Foodservice Occupations, 1977

	Number of Women Workers, 1977	Percent Change 1977/76	Proportion of Women to All Workers
Restaurant, Cafeteria & Bar Managers			
Foodservice Workers			
Bartenders	190,000	+7.3%	34.7%
Waiters' Assistants	2,805,000	+4.2%	68.5%
Cooks	114,000	+18.8%	41.9%
Dishwashers	43,000	+10.3%	22.4%
Food Counter &	623,000	+2.1%	56.3%
Fountain Workers	78,000	−6.0%	30.4%
Waiters	389,000	+8.1%	85.7%
Foodservice Workers	1,184,000	+3.7%	90.4%
(n.e.c.)	375,000	+3.6%	74.3%

Source: *Employment and Earnings*, Bureau of Labor Statistics, NRA.

Teens in Foodservice

The foodservice industry continued to provide expanding job opportunities for teenagers in 1977. More than half of those employed in foodservice occupations work part-time affording numerous teens an avenue to gain valuable work experience, many while still attending school.

Last year nearly 1.3 million teens 16 to 19 years of age were employed in specialized foodservice occupations. The importance of foodservice as an employer of teenagers is obvious when it is noted that nearly 17 percent of all employed teens worked in foodservice occupations in 1977. More than one fifth of employed female teens hold foodservice occupations.

Teenagers have become increasingly prominent in the foodservice industry in recent years as well. Last year teens held 31.3 percent of the positions in specialized foodservice occupations. Five years earlier in 1972 there were 844 thousand teenagers in foodservice occupations accounting for a more modest 25.9 percent of the total.

Teenage employment in foodservice occupations, increasing by more than 50 percent since 1972, has risen more than three times as fast as adult employment. Last year teen employment rose 7.6 percent about twice the rate of the adult employment gain of 3.6 percent. After improving each year since 1974, the growth rate for teen employment in foodservice occupations declined from 10.2 percent in 1976 to 7.6 percent last year, however.

Employment in Foodservice Occupations by Age and Sex, 1977 Percent Change From 1972

	Number of Workers, 1997	Percent Change 1977/72	Proportion of Total
Males 20+	741,000	+22.3%	18.1%
Females 20+	2,075,000	+14.4%	50.7%
Males 16-19	548,000	+44.2%	13.4%
Females 16-19	732,000	+57.8%	17.9%
Total	4,095,000	+25.5%	100.0%

Source: *Employment and Earnings*, Bureau of Labor Statistics, NRA.

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NRA WASHINGTON REPORT

NATIONAL RESTAURANT ASSOCIATION

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Highlighting This Issue

The recently published *1975 County Business Patterns* again confirms the trend toward larger eating and drinking places although it indicates that the recession adversely affected growth among the very largest establishments.

- **Eating and drinking places numbered 265,118 in 1975, an increase of 1.8 percent from 1974.**
- **Employment totaled 3,128,150 in eating and drinking places for a rise of only 1.0 percent in 1975 after increases of 9.5 percent in 1973 and 5.6 percent in 1974.**
- **Approximately 16 percent of the establishments, those having 20+ workers each, accounted for 60 percent of employment.**
- **Eating and drinking place penetration, measured by resident population per establishment, is rising rapidly in the South.**

THE TREND TO LARGER ESTABLISHMENTS CONTINUES

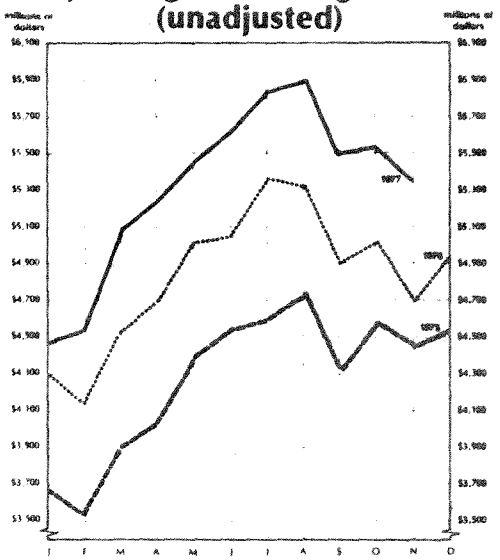
The *1975 County Business Patterns* (CBP) confirms the trend toward larger establishments but indicates that the recession negatively affected growth among the very largest eating and drinking places. In addition to showing increases in the industry's establishments and employment over a three year period, County Business Patterns (CBP) provides state-by-state data on number of establishments, employment and payroll for eating and drinking places. The following report highlights regional and state industry trends apparent from these data.

The Bureau of the Census has recently completed publication of the state-by-state data for the 1975 edition of County Business Patterns. The 1975 numerical data for eating and drinking places represent the third consecutive year's figures. Although the CBP number of establishments data do not conform to data from the 1972 Census of Retail Trade, due in part to a definitional difference, they do provide us with valuable indicators of growth, particularly the trend toward larger establishments.

The 1975 CBP count of eating and drinking places totaled 265,118, considerably below the count of 287,250 establishments with payroll in the 1972 Census of Retail Trade. An explanation for the much lower CBP count is that questionnaire mailings are not made to multiunits with fewer than 50 employees if they are not known multiunits. Therefore, a downward bias is created in that some firms with fewer than 50 employees may not be asked to enumerate each establishment or location they operate. Total employment as of March 12 is available, however.

It is noteworthy that the three years for which comparable CBP counts are available show an upward trend in the number of eating and drinking places from 259,112 in 1973 to 265,118 in 1975 as well as substantial growth in paid employees.

Monthly Eating & Drinking Place Sales* (unadjusted)



*Based on revised sample
Source: *Current Business Reports*, Bureau of Census.

Trend Toward Larger Establishments

The table below shows the 1974 and 1975 CBP eating and drinking place counts broken down by employment size of establishment (1973 data are not available) compared to the 1972 Census count by employment size. The Census figures are adjusted to include those establishments not operated for the full year, since such establishments are included in CBP.

Number of Eating & Drinking Places By Employment Size of Establishment

	1975	1974	1972
1-9 Employees	180,067	178,926	209,188
10-19 Employees	42,192	40,860	43,838
20+ Employees	42,859	41,694	35,224
Total	265,118	261,480	287,250

Even though the total number of eating and drinking places enumerated by CBP does not conform to previous Census data and contains a downward bias, the trend toward larger establishments is still evident. The number of establishments reporting 20+ employees rose dramatically between 1972 and 1974 and gained an additional 2.8 percent in 1975. A more detailed breakdown below, for 1974 and 1975 shows that the most rapid growth occurred among establishments having 20-49 employees, with the number of units up 3.6 percent, followed by establishments having 10-19 employees which posted a 3.3 percent gain in numbers.

The largest establishments, employing 100+ workers, declined in number from 1,514 in 1974 to 1,420 in 1975, however, most likely as a result of the recession which adversely affected some large firms, particularly contract feeders, as employment in manufacturing industries declined 8.5 percent from 20.0 million in 1974 to 18.3 million in 1975.

Number of Eating & Drinking Places By Employment Size of Establishment

	1975	1974	% change
1-9 Employees	180,067	178,926	+0.6%
10-19 Employees	42,192	40,860	+3.3%
20-49 Employees	33,382	32,236	+3.6%
50-99 Employees	8,057	7,944	+1.4%
100+ Employees	1,420	1,514	−6.2%
Total	265,118	261,480	

Overall Establishment Growth Rises in 1975

Eating and drinking establishments numbered 265,118 in 1975, according to CBP, for an increase of 4,638 establishments or 1.8 percent from 1974. The 1975 gain in number of establishments was nearly double the growth of 2,368 or .9 percent in 1974. These data seem to confirm sales figures showing that the foodservice industry rebounded early in 1975 from the recession which did adversely affect the industry in 1974 when real sales remained unchanged.

On a regional basis, the Mountain and South Atlantic states continued to experience above average growth in number of establishments in 1975. Since these two regions have experienced rapid population and income advances, increased numbers of eating and drinking places are not unexpected. The West North Central states also posted a well above average 2.6 percent gain in number of eating and drinking places in 1975, reversing a small decline in 1974.

On the other hand, the number of eating and drinking places in the Middle Atlantic states declined by 0.4 percent in 1975, due primarily to a drop of 1.3 percent in the number of eating and drinking places in New York, after rising only 0.5 percent in 1974. Growth in number of units in the New England states was still below average in 1975 although the rate rose from 0.3 percent in 1974 to 1.0 percent in 1975.

On a state-by-state basis the change in number of establishments in 1975 ranged from a high of 5.8 percent in Wyoming to a decline of 2.6 percent in Delaware. Fourteen other states in addition to Wyoming recorded increases of 3 percent or more including Maine, Vermont, Connecticut, South Carolina, Florida, Oklahoma, Minnesota, North Dakota, Nebraska, Kansas, Colorado, New Mexico, Nevada and Hawaii. Only half of these states also recorded above average gains in numbers of establishments in 1974, however. States showing an above average two-year upward trend in establishment count are Connecticut, South Carolina, Florida, North Dakota, Colorado, Nevada and Hawaii.

Only three states, aside from Delaware, posted declines of one percent or more in establishment count for 1975. Included were New York, Arkansas and the District of Columbia. None of these recorded declines in 1974, however. Thus, no real downward trend is evident.

Employment Growth Lags in 1975

Eating and drinking place employees numbered 3,128,150 as of the week of March 12, 1975 for an increase of only 1.0 percent from 3,096,853, in 1974. It appears that eating and drinking place employment growth lagged as the industry began to rebound from the recession. The employment growth rate trended downward from 9.5 percent in 1973 to 5.6 percent in 1974 and only 1.1 percent the following year which supports the theory that employers are slow to cutback during recession periods and equally slow to start hiring when the economy begins to recover. Readers should note that the employment figures cited above do not represent the total for the foodservice industry as a whole which NRA surveys indicate is about 8 million.

Bureau of Labor Statistics employment data, which conform fairly closely with CBP, point toward a marked increase in the employment growth rate for eating and drinking places in 1976.

Although the growth rate in number of employees dropped off in each of the nine Census regions from 1973 to 1974 and 1974 to 1975, the South Atlantic, Pacific and East South Central States recorded employment growth well above average in 1977. On the other hand, employment declined in the West South Central region after posting above average gains in the two previous years.

Twelve states recorded employment growth of 5 percent or more in 1975 and Alaska ranked number one with a 27.7 percent gain following another first ranking 15.6 percent gain in the previous year. Only five of the twelve states reported above average employment growth in both 1974 and 1975, however. In addition to Alaska, these were South Carolina, North Dakota, Nevada and Washington.

Larger Establishments Account for 25% of Employment

On a nationwide basis 3.5 percent of establishments had 50+ employees in 1975 while an additional 12.6 percent employed 20-49 workers. Those establishments

STATE-BY-STATE EATING & DRINKING PLACE ESTABLISHMENTS & EMPLOYMENT

	Number of Establishments	Percent Change		Employment 1975	Percent Change		Proportion of Establishments Having 50+ Employees
		1975/74	1974/73		1975/74	1974/73	
United States	**265,118**	**+1.8%**	**+ .9%**	**3,128,150**	**+ 1.0%**	**+ 5.6%**	**3.5%**
New England							
Maine	1,096	+5.2	−4.7	11,313	+ 2.3	+ 2.6	3.0
New Hampshire	990	+1.4	+ .8	11,875	+ 5.2	+ 8.1	2.1
Vermont	637	+3.4	−4.8	6,438	+ 1.7	− 2.5	.9
Massachusetts	7,514	− .9	+ .8	95,582	− 2.8	+ .3	4.5
Rhode Island	1,347	+1.5	− .8	13,782	− 5.9	+ 7.6	2.6
Connecticut	3,954	+3.0	+2.1	43,412	+ 5.2	+ 2.4	2.8
Middle Atlantic							
New York	24,829	−1.3	+ .7	227,522	+ .8	+ .8	2.3
New Jersey	9,168	—	+2.6	92,307	+ 1.6	+ 3.5	3.3
Pennsylvania	14,856	+1.0	− .4	152,656	+ 2.5	+ 4.6	3.3
South Atlantic							
Delaware	608	−2.6	+1.1	8,887	+ 8.7	− 1.8	3.8
Maryland	4,294	+2.3	+ .9	59,860	+ 2.8	+ 4.3	5.2
Dist. of Col.	951	−1.0	+1.3	18,818	− 1.0	− 5.6	9.7
Virginia	4,689	+2.5	+3.7	58,968	+ 3.4	+ .5	4.1
W. Virginia	1,798	+2.9	−3.1	16,036	+ 2.0	+ 4.0	2.4
N. Carolina	4,807	+1.8	+2.9	55,524	+ 3.8	+ 4.0	2.5
S. Carolina	2,264	+3.5	+2.2	26,361	+ 8.0	+ 6.9	2.7
Georgia	4,373	+1.5	+6.2	61,945	+ 1.3	+ 7.0	4.5
Florida	9,528	+3.8	+2.2	147,163	+ 1.7	+ 8.9	5.8
East South Central							
Kentucky	3,145	+1.3	+2.3	38,207	+ 1.0	+ 8.4	3.4
Tennessee	3,975	+2.9	+2.3	48,031	+ 1.3	+ 8.5	3.9
Alabama	2,825	+ .8	+2.0	32,633	+ 2.6	+ 1.7	3.3
Mississippi	1,770	+2.1	−1.4	17,080	+ 5.4	− 1.0	1.8
West South Central							
Arkansas	2,071	−1.1	+ .1	18,541	− 6.3	+ 7.8	1.3
Louisiana	3,771	+1.3	− .8	43,791	+ 7.1	− .5	3.3
Oklahoma	3,509	+3.4	+ .6	39,950	− .1	+10.6	2.5
Texas	14,725	+1.0	+ .9	179,017	− 4.3	+12.2	3.6
East North Central							
Ohio	14,556	+1.4	—	166,544	+ 2.8	+ 1.3	3.7
Indiana	6,709	+1.9	+1.4	82,812	− 1.8	+ 5.2	3.3
Illinois	14,590	+2.5	− .4	184,419	+ 2.1	+ 6.0	4.2
Michigan	10,997	+ .6	− .3	132,849	− 6.1	+11.0	4.0
Wisconsin	7,993	+1.4	+1.7	81,679	+ 2.7	+ 7.7	3.0
West North Central							
Minnesota	4,595	+3.0	−1.9	68,369	+ 1.6	+ 8.9	6.2
Iowa	4,700	+2.8	+ .7	46,829	+ 3.3	+ 7.2	2.3
Missouri	5,992	+1.3	− .1	75,236	+ .6	+ 7.5	4.4
N. Dakota	1,122	+4.0	+2.0	10,188	+ 7.2	+ 8.4	1.7
S. Dakota	1,071	—	+ .3	10,635	+ 2.2	+ 5.4	1.8
Nebraska	2,508	+3.1	+ .3	27,314	− 1.1	+ 6.2	3.1
Kansas	3,210	+4.1	− .6	35,266	+ 1.9	+ 7.4	2.1
Mountain							
Montana	1,529	—	+1.1	13,171	+ 5.3	+ 3.9	1.2
Idaho	1,178	+ .5	−4.7	12,840	+ 1.4	+10.5	2.1
Wyoming	671	+5.8	+2.6	7,214	+ .2	+13.8	1.9
Colorado	3,724	+4.0	+3.2	55,014	+ .1	+11.4	4.8
New Mexico	1,466	+3.1	+ .5	16,477	− 4.4	+12.9	2.5
Arizona	2,883	+2.4	+2.5	39,154	− .3	+10.0	4.4
Utah	1,496	+2.3	+4.2	20,760	+ 4.4	+ 2.4	3.1
Nevada	972	+3.0	+4.3	10,641	+ 6.6	+ 7.1	2.4
Pacific							
Washington	4,791	+ .2	+2.1	58,072	+ 5.4	+ 6.5	2.7
Oregon	3,500	+1.0	+1.6	43,321	+ 8.4	+ 4.9	2.9
California	29,594	+1.6	+1.0	373,703	+ .8	+ 5.7	4.0
Alaska	495	+ .4	+7.6	5,719	+27.7	+15.6	2.8
Hawaii	1,282	+3.5	+4.2	24,225	+ 1.2	+ 5.7	8.4

Sources: *1973, 1974, 1975 County Business Patterns*, Bureau of the Census.

employing 50+ accounted for slightly more than one-fourth of the workers while those with 20-49 employees accounted for nearly 35 percent of employees. Thus, only 16 percent of the establishments employed 60 percent of the workers.

Regionally, the South Atlantic states were most likely to have large establishments with 23.3 percent having more than 20 employees. Only 15.3 percent of establishments in the Middle Atlantic states had 20+ workers, on the other hand.

Eating and Drinking Place Penetration Increases in South

A measure of eating and drinking place penetration, resident population per establishment, can be derived from CBP and Census population estimates. These data

indicate that there were 804 persons for each eating and drinking establishment on a national basis in 1975, as is shown in the table. Regional variation was dramatic, however, ranging from one establishment per 693 resident population in the Mountain states to one per 1,156 in the East South Central region.

It is particularly noteworthy that the number of persons per establishment dropped in the South Atlantic states indicating increased penetration in the face of substantial population increases over the three year period from 1973 to 1975. Eating and drinking place penetration also increased significantly in the East South Central states although it did not buck rapid population growth such as was experienced in the South Atlantic region. In contrast, resident population per establishment remained fairly constant in the Middle Atlantic, Mountain and Pacific states and actually increased in the West South Central region.

DISTRIBUTION OF ESTABLISHMENTS BY EMPLOYMENT SIZE, 1975

	Total Eating/Drinking Establishments	Percent by Employment Size 1-9 Employees	10-19 Employees	20-49 Employees	50-99 Employees	100+ Employees
United States	265,118	68.0%	15.9%	12.6%	3.0%	0.5%
New England	15,538	68.4	14.8	13.4	2.9	0.6
Middle Atlantic	48,853	75.6	11.7	9.7	2.2	0.6
South Atlantic	33,312	63.1	18.0	14.3	3.8	0.7
East South Central	11,715	66.7	18.5	11.5	2.8	0.5
West South Central	24,076	66.2	19.0	11.5	2.7	0.5
East North Central	54,845	68.0	15.1	13.1	3.3	0.5
West North Central	23,198	67.4	16.7	12.4	3.2	0.4
Mountain	13,919	64.7	18.3	13.7	2.8	0.5
Pacific	39,662	65.0	16.7	14.4	3.3	0.5

Note: For states' regional designation refer to the table on page 3.
Source: *1975 County Business Patterns*, Bureau of the Census.

EATING AND DRINKING PLACE PENETRATION, ESTABLISHMENTS PER RESIDENT POPULATION, 1973-1975

	1975	1974	1973
United States	804	808	810
New England	785	790	793
Middle Atlantic	763	760	768
South Atlantic	1,012	1,022	1,029
East South Central	1,156	1,166	1,173
West South Central	866	863	856
East North Central	747	758	758
West North Central	719	738	734
Mountain	693	696	693
Pacific	712	711	712

Note: For states' regional designation refer to the table on page 3.
Sources: *1975, 1974 County Business Patterns; Estimates of the Population of States with Components of Change: 1970 to 1975*, Bureau of the Census.

Industry Index

RETAIL SALES* (millions of dollars)	Four Weeks Ended 12/17/77	Percent Change vs. Year Ago	Year to Date 12/17/77	Percent Change vs. Year Ago
Eating & Drinking Places	$ 4,788	**+9.9%**	$ 61,183	**+10.0%**
Food Stores	$12,517	**+8.6%**	$149,363	**+ 7.8%**

(Source: Bureau of Census)

FOOD PRICES	Percent Change November vs. Year Ago	Percent Change 1977 to Date vs. Year Ago
Food Away From Home	+8.1%	+7.6%
Food at Home	+7.9%	+5.7%

(Source: Bureau of Labor Statistics)
*New census sample.

NRA WASHINGTON REPORT

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ECONOMIC REPORT

Supplement to the Washington Report

NATIONAL RESTAURANT ASSOCIATION

December 12, 1977

1977 CENSUS VALUABLE TO FOODSERVICE OPERATORS

Early in 1978 many foodservice operators will have the opportunity to contribute to the most widely recognized source of information about the restaurant industry. The quinquennial Census of Retail Trade, conducted for years ending in 2 or 7, provides us with a detailed picture of the structure of our industry as well as industry growth trends. It is used by foodservice firms, suppliers and investors for planning and forecasting purposes. Thus, it is vitally important that each operator who receives a questionnaire take the time to complete all applicable questions.

The Bureau of the Census will mail over 2.5 million questionnaires to business and industrial firms throughout the United States beginning in the week of December 26, 1977. This will be the first step in the collection of data for the 1977 Economic Censuses. Completed forms are due by February 15, 1978 and the Bureau of the Census is slated to begin releasing data from the Censuses late in 1978.

The information obtained in the Economic Censuses constitutes the primary factual source about the structure and functioning of the economy. Business officials use the data to gauge potential markets, to make economic and sales forecasts, to analyze sales performance, to lay out sales territories, to allocate expenditures for advertising, and to decide on locations for new plants, warehouses and stores.

Firms receiving questionnaires are required by law to respond. The same census law protects the privacy of all information reported to the Census Bureau by providing that the information reported in a census (1) may be used only for statistical purposes; (2) may not be published so that information for any individual business firm can be identified; and (3) may not be seen by anyone other than sworn Census employees. Census reports may not be used for purposes of taxation, investigation or regulation.

Who Receives A Questionnaire

Most eating and drinking place operators will receive a 1977 Census questionnaire. Questionnaires will be mailed to all restaurants and social caterers with annual payroll of $20,800 or more, cafeterias and limited menu refreshment places with payroll of $15,600, ice cream and frozen custard stands and bars with payroll of $5,200 and all contract feeders as well as 10 percent of establishments below these payroll cutoff points. Data concerning other establishments will be obtained by the Census Bureau from the administrative records of other government agencies.

Estimates Are Acceptable

Census Bureau officials stress that estimates should be made when solid data are lacking. It is most important to respond to all applicable questions.

For instance, eating and drinking place operators, excluding contract feeders, will be asked in the 1977 Census, for the first time, to estimate average expenditure per person per meal. If such data are not available from establishment records, it should be a fairly simple matter to make an appropriate estimate particularly since the respondent is asked only to check one of the following ranges

Under $2.00
$2.00-$4.99
$5.00-$9.99
$10.00 or more

To estimate the average expenditure per person if customer count figures are unavailable for 1977, the operator might simply count customers for several days in early 1978 and divide the total into sales for those days.

Remember all the Census Bureau requires is an estimate. This is not like filling out forms for IRS!

Contract feeders and vending machine operators should also take the opportunity to estimate when they are asked what percent of manual feeding sales is derived from various types of facilities such as hospitals or percent of sales derived from specific items such as tobacco or meal and snack items in vending machines.

Again, it is important to fill in as much of the form as possible. A low response rate to a particular question makes data much less reliable.

Census Data Widely Used

Data from the 1977 Census will be vitally important to the foodservice industry. Census figures provide the data base from which industry size and growth trends are analyzed and projections are made.

Foodservice industry suppliers will most likely use new eating and drinking place census data to assist in updating the layout of their sales territories as well as for projecting future industry needs.

NRA uses the Census in a variety of ways. It provides the data on the type of establishment, sales, employment and multiunit firms in the category of eating and drinking places and the breakdown of sales according to "merchandise line" such as food and beverages in all retail stores. Many of the estimates which are used to build up to total foodservice industry sales are derived from Census data and these figures are widely distributed to industry investors through banks and other financial institutions.

NRA is particularly interested in several new questions which we helped Census officials design in order to provide the industry with a more useful product. One of these questions asks for average check amount per person. If as many respondents as possible answer this question, the results should do a great deal to clarify the composition of the large "restaurant" category which encompasses more than 100,000 establishments. This new breakdown will provide us with price data for the first time. Price information, along with type of service offered, are two of the most important determining factors used to classify establishments in more detail such as coffee shops or luxury restaurants.

PART-TIME EMPLOYMENT IN FOODSERVICE OCCUPATIONS TRENDS UPWARD

***Work Experience of the Population in 1976*, published by the Bureau of Labor Statistics, reveals that the long term trend toward part-time workers in foodservice continued last year. The number of full-time foodservice workers rose in 1976, however, after declining in the previous year.**

Unlike many other occupations foodservice provides its employees with the option to work either part-time, full-time or seasonally.

In 1976 nearly 56 percent of all those persons who held foodservice occupations at one time or another during the year worked part-time. A total of 5,716,000 persons worked either full- or part-time in foodservice occupations at some time during 1976. Of that number 3,189,000 usually worked part-time, 1 to 34 hours a week, while 2,527,000 or 44 percent worked full-time or 35+ hours weekly.

It should be emphasized that data from *Work Experience of the Population* refer to all persons who held foodservice occupations at any time in 1976. Thus, the figure of 5.7 million in foodservice occupations used here is substantially greater than the average of 3.9 million persons working at one time in foodservice occupations. Foodservice occupations include bartenders, waiters' assistants, cooks, dishwashers, counter workers, waiters and others; however, many workers are employed by the foodservice industry in managerial occupations or other lines of work such as cashiers, bookkeepers and janitors. The total number of workers in the foodservice industry is therefore much greater than the numbers given above for foodservice occupations.

Persons employed in foodservice occupations at some time in the year rose from 5.0 million in 1974 to 5.3 million in 1975 and 5.7 million last year, for increases of 5.7 and 7.3 percent respectively.

Part-Time Employment Rises

The proportion of foodservice workers employed part-time rose from 51 percent in 1974 to nearly 56 percent last year. It is notable that part-timers account for a greater proportion of those in foodservice occupations than they do in most other fields of work. For example, about 48 percent of retail sales workers work 1 to 34 hours weekly while only 1.3 percent of medical professionals work part-time. Among all occupational groups slightly more than one-fifth or 21.5 percent of those with work experience usually worked part-time in 1976.

The number of persons who worked at some time during the year in a part-time capacity in foodservice occupations rose 12 percent from 2,848,000 in 1976 to 3,189,000 in 1976, the same percentage gain as in 1975.

Men are less likely than women to hold part-time rather than full-time jobs in foodservice occupations. While about half or 49.8 percent of men who worked at some time in 1976 in foodservice occupations worked 1 to 34 hours per week, 58.3 percent of the women were part-timers.

Full-Time Employment

Approximately 2,527,000 persons held full-time jobs in foodservice occupations at some time during 1976, up nearly 2 percent from the 2,481,000 in 1975. The increase in persons working in full-time jobs reverses a decline from 1974 to 1975 and most likely reflects improved overall economic conditions as well as continued growth in foodservice.

Less than half or 45.6 percent of those persons who held full-time jobs last year worked for a full 50 to 52 weeks. Of the remaining full-time workers, 24.3 percent worked 27 to 49 weeks and 30.1 percent 1 to 26 weeks during the year.

Women who worked at full-time foodservice occupations at some time during 1976 were much less likely than men to work for the full year. Of the 854,000 males working at full-time jobs, slightly more than half worked 50 to 52 weeks during the year while only 42.7 percent of the women holding full-time jobs worked for the entire year.

Full- and Part-Time Workers in Foodservice Occupations, 1974-1976

	1976	1975	1974
Total who worked during the year	5,716,000	5,329,000	5,041,000
Full- or part-time			
Usually full-time	2,527,000	2,481,000	2,491,000
Usually part-time	3,189,000	2,848,000	2,550,000
Percent part-time	56%	53%	51%

Source: *Work Experience of the Population*, Bureau of Labor Statistics.

Full-Time Workers in Foodservice Occupations, 1976

	Men		Women	
	Number	Percent	Number	Percent
Total who worked during the year	854,000	100.0%	1,673,000	100.0%
Weeks of full-time work				
50-52 weeks	439,000	51.4%	714,000	42.7%
27-49 weeks	177,000	20.7%	437,000	26.1%
1-26 weeks	238,000	27.9%	522,000	31.2%

Source: *Work Experience of the Population, 1976*, Bureau ofLabor Statistics.

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NRA WASHINGTON REPORT

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NATIONAL RESTAURANT ASSOCIATION

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Highlighting This Issue

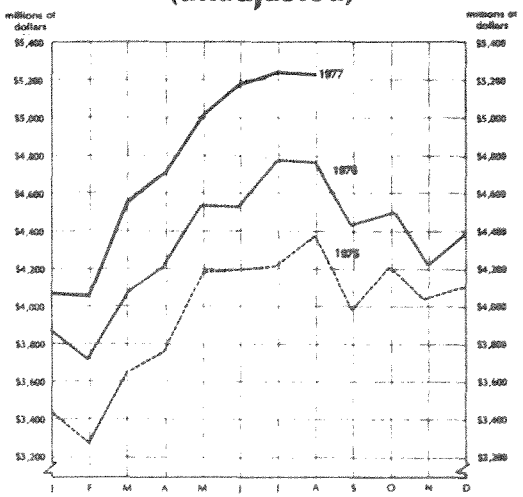
- **The Bureau of Labor Statistics' first time study of eating and drinking place productivity discloses that labor saving techniques and rapidly expanding chains as well as a decline in number of drinking places have helped to boost output per employee hour.**
- **Eating and drinking place productivity rose at an average annual rate of 1.0 percent from 1958 to 1976, substantially below average annual growth of 2.8 percent for the entire private economy.**
- **Gains in industry output are reflective of the trend toward increased real per capita spending for food away from home.**
- **Although eating and drinking place employment doubled from 1958 to 1976, total hours rose only about half as much due to the influx of part-time workers.**

EATING & DRINKING PLACE PRODUCTIVITY ADVANCES SLOWLY

A recently completed pioneering study by the Bureau of Labor Statistics reveals that productivity in eating and drinking places rose at an average annual rate of 1.0 percent from 1958 to 1976. Productivity, as measured by output per employee hour, varied widely over the eighteen year span, however, and gains achieved in eating and drinking places were substantially below the average annual growth of 2.8 percent in the entire private economy during the same time period.

The BLS measure of productivity in eating and drinking places, in short, reflects changes in the relationship between output or real sales and labor time or hours worked. A more complete description of measurement techniques and limitations is given later in this report.

Monthly Eating & Drinking Place Sales (unadjusted)



Source: *Current Business Reports*, Bureau of Census.

Industry Composition Influences Productivity

The makeup of the eating and drinking place industry changed substantially during the eighteen year period from 1958 to 1976. Although the impact of these changes cannot be directly measured, they undoubtedly did affect productivity, according to BLS.

The BLS study notes that the number of drinking places declined 7 percent from 1958 to 1972 while the number of eating places rose 10 percent with most of the increase attributable to establishments belonging to multi-unit firms. In addition, fast food franchise establishments proliferated during the eighteen year period.

BLS reports that "the expansion of fast food establishments has introduced profound systemic changes in the food industry which lie at the root of recent and future productivity improvements." Of particular note was the introduction by fast food firms of principles of industrial engineering including work organization and layout to retail foodservice. Many fast food firms have developed standardized managerial practices. They pioneered foodservice training programs, site selection, design of facilities and continuous managerial services to establishments.

Labor Saving Innovations

Labor saving innovations have been associated with eating and drinking place productivity gains, according to BLS. Three kinds of technological advances were cited: "1) the off-premise preparation of foods which permits reduction in on-premise preparation time and employee hours, 2) the simplification of work processes through improvements in materials handling and cooking devices and 3) innovations in food preservation methods and equipment."

The major technological development in food preparation is the wide variety of convenience foods which reduce on premise labor cost and promote portion control.

The major improvement in processing equipment has been the microwave oven which reduces cooking time. In addition, important developments have occurred in food preservation including equipment for quick freezing of fresh foods and efficient thawing of frozen foods.

Industry Productivity Outlook

The BLS study concludes that productivity in the eating and drinking place industry should keep on improving assuming continued gains in real per capita and family income will spur rising industry output.

The industry is also expected to become more capital intensive as labor saving equipment comes into wider use.

Productivity Trends Upward

Eating and drinking place productivity rose at an average annual rate of only 0.5 percent between 1958 and 1964, the first seven years for which BLS has made data available. This annual increase of 0.5 percent is just half of the long-term productivity growth trend. It reflects gains in both output and aggregate hours that were well below those achieved in later years.

On the other hand, productivity increases accelerated to an average annual rate of 2.3 percent from 1964 to 1968. These gains were due to rapidly expanding output while employee hours advanced at only a moderate pace. The table on page 3 indicates that the index of output for eating and drinking places advanced 17.6 percent from 1964 to 1968 while the aggregate employee hours index rose only 7.4 percent.

Since 1968 productivity improvement has again slowed to an average annual rate of 0.4 percent. Both output and hours have grown vigorously, however, as the index of eating and drinking place output rose 24.9 percent from 1968 to 1976 and the index of employee hours registered a 23.4 percent overall gain.

It is noteworthy that annual changes in labor productivity have deviated significantly from the long-term trend. The largest gain in eating and drinking place productivity in the past eighteen years of 3.4 percent occurred in 1970 and was followed in 1971 by the largest decline of 2.2 percent.

In the two most recent years for which eating and drinking place productivity figures are available, productivity rose 2.1 percent in 1975 as a result of rising output and a moderate increase in hours. On the other hand, last year productivity declined 1.7 percent as growth in the index of employee hours outpaced the gain recorded in output.

Rising Consumer Income Affects Industry Output

The eating and drinking place industry's output gains are reflective of the trend toward increased real per capita spending for food away from home. The relationship between changes in industry output and changes in real per capita income is illustrated below.

Average Annual Percent Change

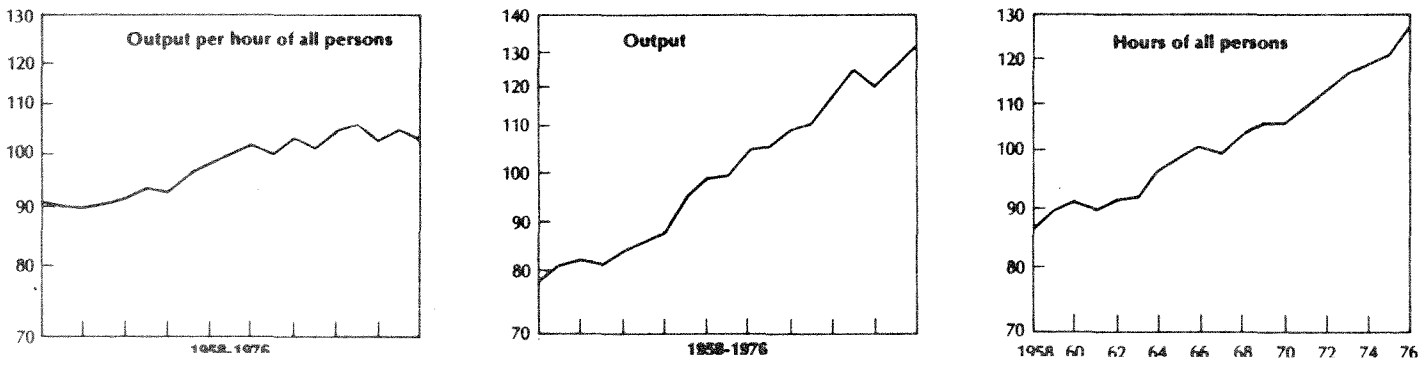
	Eating & Drinking Place Output	Real Per Capita Income
1958-1976	3.1%	2.8%
1958-1963	1.6%	1.5%
1963-1968	4.0%	4.0%
1968-1976	3.0%	2.3%

BLS points out that relatively slow annual advances in eating and drinking place output of 1.6 percent between 1958 and 1963 occurred when real per capita income was rising at a slow 1.5 percent annual pace. More rapid income increases are linked to accelerated growth in eating and drinking place output from 1963 to 1968. It is noteworthy that average annual increases in output consistently have equaled or outpaced growth in real per capita income during each of the periods.

Demographic factors influencing the long-term trend toward increased eating and drinking place output which were highlighted in the BLS study include the rapid rise in the number of single person households who spend a greater proportion of their food dollar away from home and the increase in working wives.

Productivity, output, and hours in eating and drinking places, 1958-76

Ratio scale (1967 = 100)



Indexes of productivity, output, and hours in food service establishments, 1958-76 [1967 = 100]

Year	Output per hour of all persons	Output	Hours of all persons
1958	91.3	78.8	86.3
1959	90.3	81.0	89.7
1960	90.0	81.6	90.7
1961	90.8	81.5	89.8
1962	91.8	84.0	91.5
1963	93.8	86.0	91.7
1964	93.1	89.8	96.5
1965	96.0	95.5	99.5
1966	98.0	99.4	101.4
1967	100.0	100.0	100.0
1968	101.9	105.6	103.6
1969	100.1	106.3	106.2
1970	103.5	110.4	106.7
1971	101.2	111.6	110.3
1972	104.4	118.5	113.5
1973	106.0	124.6	117.5
1974	102.8	122.9	119.6
1975	105.0	127.4	121.3
1976	103.2	131.9	127.8

Source: Bureau of Labor Statistics.

Both of these demographic factors have been discussed at length in previous issues of the *Washington Report*.

Industry Employment Doubles as Hours Moderate

Eating and drinking place employment doubled between 1958 and 1976 when it reached 3.6 million, rising at an average annual rate of 3.9 percent. Employment growth followed a pattern similar to that of output, relatively slow growth from 1958 to 1963, but accelerating after 1964.

The total number of hours of persons engaged in eating and drinking places rose only about half as much as employment, however. Average weekly hours for nonsupervisory employees declined to 28.0 in 1976 from 35.6 in 1958, due partially to the expansion of part-time employees. Fifty-one percent of all workers in the industry worked part-time in 1975 compared to 32 percent in 1962. In addition, there has been a decline in the number of proprietors and partners and the working hours of supervisory personnel dropped from 61 hours in 1958 to 51 hours in 1975.

Although the occupational composition of the industry has not changed significantly since 1972, limited data from earlier years show a steady contraction in the number of waiters and waitresses and expansion in counter jobs.

Widespread Productivity Gains Reported in 1976

Productivity in the economy rose substantially last year based on the 3.7 percent increase reported for the nonfarm business sector and compared to a 1.6 percent rise in 1975. Favorable productivity growth in 1976 was associated with the general economic recovery. Eating and drinking place productivity, however, failed to grow although output expanded, because aggregate employee hours registered a larger gain.

Eating and drinking places recorded a 1.7 percent decline in productivity in 1976. Among other retail and service industries for which BLS computes productivity data, each recorded an advance in 1976 with gasoline service stations leading the growth. The table on page 4 describes productivity indexes for five retail and service industries from 1970 to 1976.

Measurement Techniques and Limitations

Eating and drinking place productivity indexes reflect changes in the relation between output and the labor time involved in its production. It is important to note that indexes do not measure specific contributions of any one factor of production although they do relate output to employment and hours.

In constructing indexes of output it is preferable to use data on the quantities of the various services performed in the industry; however, "annual index of output for the food service industry were derived from the constant dollar value of industry receipts. These annual indexes were periodically adjusted to more comprehensive industry data available for the years in which an economic census was prepared. Indexes of sales in constant dollars weighted by gross margins were developed by type of food service outlet. These indexes were then combined with labor time (hours of all persons) weights to arrive at a benchmark level of output . . . Because of the lack of pertinent data, the BLS measure has not been adjusted for changes in the industry's labor requirements originating outside the industry, as to that extent the measure may be biased upward.

"The input index of industry hours is constructed from data on employment and hours collected by the Bureau of Labor Statistics, the Internal Revenue Service and the Census Bureau. The index includes paid supervisory and nonsupervisory employees, and the self-employed (partners and proprietors). The hours data relate to all full-time and part-time workers."

Employment in food service occupations, 1972 and 1976

Occupation	1972 Number	1972 Percent	1976 Number	1976 Percent
Restaurant, cafeteria, and bar managers	494	13.2	505	12.1
Food service workers	3,263	87.0	3,919	88.6
Bartenders	201	5.4	261	5.9
Waiters and assistants	1,263	33.6	1,450	32.8
Cooks	866	23.1	1,065	24.1
Dishwashers	218	5.8	251	5.7
Counter and fountain workers	307	8.2	421	9.5
Other (except managerial)	408	10.9	471	10.6

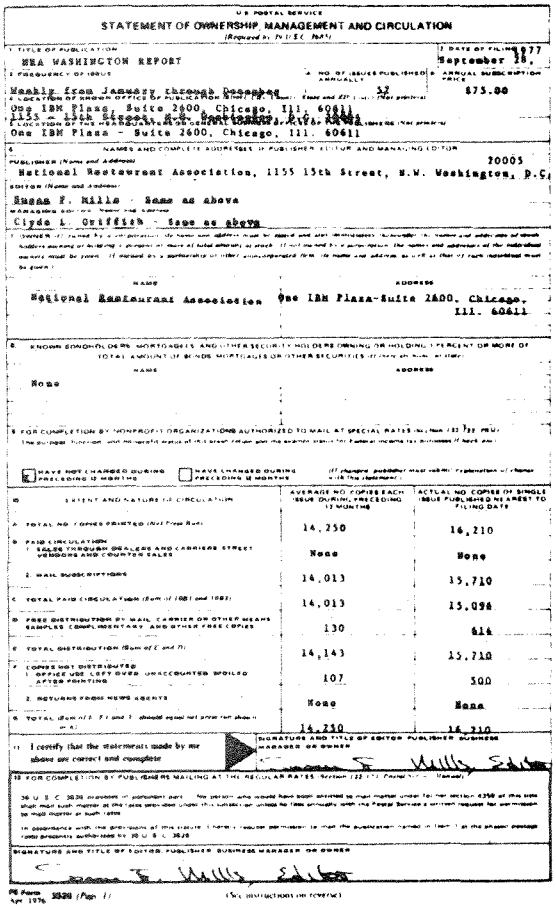
Source: BLS Employment and Earnings. Comparable data for years prior to 1972 are not available.

78-194

Indexes of Output Per Employee-hour in Selected Industries, 1970-76, and Percent Changes, 1975-76
(1967 = 100)

Industry	1970	1971	1972	1973	1974	1975	1976	Percent Change 1975-76
Retail food stores	110.3	111.9	113.3	107.5	104.6	106.7	106.7	.05
Franchised new car dealers	106.4	113.3	116.9	119.5	116.2	122.4	128.4	4.9
Gasoline service stations	122.5	124.6	127.2	136.1	139.0	135.6	148.8	9.8
Eating and drinking places	103.5	101.2	104.4	106.0	102.8	105.0	103.2	−1.7
Hotels and motels	102.6	92.0	109.4	109.9	102.9	104.4	109.6	4.9

Source: Bureau of Labor Statistics.



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PS Form 3526 (Page 1) (See instructions on reverse)

Industry Index

RETAIL SALES (millions of dollars)	Four Weeks Ended 9/24/77	Percent Change vs. Year Ago	Year to Date 9/24/77	Percent Change vs. Year Ago
Eating & Drinking Places	$ 4,458	+6.6%	$ 41,655	+9.5%
Food Stores	$11,813	+8.8%	$108,937	+7.8%

(Source: Bureau of Census)

FOOD PRICES	Percent Change August vs. Year Ago	Percent Change 1977 to Date vs. Year Ago
Food Away From Home	+8.1%	+7.4%
Food at Home	+6.7%	+5.2%

(Source: Bureau of Labor Statistics)

NRA WASHINGTON REPORT

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NEWSPAPER

78-195

ECONOMIC REPORT

Supplement to the Washington Report

NATIONAL RESTAURANT ASSOCIATION

August 29, 1977

WHAT AMERICANS DRINK

The drinking habits of Americans have changed substantially over the past two decades. Since beverages, alcoholic and nonalcoholic, are an integral part of the foodservice industry, accounting for about $6.4 billion of total industry food and drink purchases of $31 billion in 1975, these beverage consumption trends have a strong impact on restaurant operations.

The following report reviews per capita beverage consumption and expenditure data from 1955 to 1975 as well as trends concerning sales of soft drinks, both regular and dietetic.

Nonalcoholic Beverage Consumption Up 25%

Per capita consumption data from 1955 to 1975 illustrate changes which have occurred over the past twenty years in the American preferences for beverages. Besides water, which is excluded here, the principal nonalcoholic beverages are milk, soft drinks, coffee, tea, cocoa and fruit and vegetable juices.

Consumption per person of all nonalcoholic beverages rose 25 percent from 1955 to 1975 with soft drinks leading the way. Milk and coffee consumption trended downward while soft drink consumption more than doubled. Milk consumption dropped 5.0 percent from 1955 to 1965 and at a slightly faster pace of 7.4 percent in the following ten years. All of the decline in the popularity of coffee drinking occurred from 1965 to 1975 when per capita coffee consumption dropped 15 percent. In 1976 and 1977 coffee consumption has declined in reaction to spiraling coffee prices.

PER CAPITA BEVERAGE CONSUMPTION, 1955-1975

(1955=100)

	1965	1975
Milk	95	88
Soft Drinks	164	236
Coffee	100	85
Tea & Cocoa	117	135
Fruit & Vegetable Juices & Drinks	110	178
All Nonalcoholic Beverages	111	125
Beer	103	137
Wine	111	192
Whiskey, Gin, Rum	130	187
All Alcoholic Beverages	114	161
All Beverages	113	144

Note: Alcoholic beverages for year ending June 30 of year shown.
Source: *National Food Situation*, U.S. Department of Agriculture.

Tea and cocoa consumption recorded an increase of 17 percent from 1955 to 1965 and 15.4 percent in the following ten years. Most of the increase in per person consumption of juices took place in the recent years—from 1965 to 1975—as juice consumption rose 60.4 percent after increasing only 11.0 percent from 1955 to 1965.

PER CAPITA BEVERAGE EXPENDITURES, 1955-1975

	1955	1965	1975
Milk	$ 29	$ 31	$ 48
Soft Drinks	8	19	59
Coffee	12	10	14
Tea & Cocoa	2	2	4
Fruit & Vegetable Juices & Drinks	4	6	13
All Nonalcoholic Beverages	$ 55	$ 69	$138
Beer	31	35	69
Wine	6	7	19
Whiskey, Gin, Rum	24	34	58
All Alcoholic Beverages	$ 61	$ 74	$147
All Beverages	$116	$145	$284

Notes: Alcoholic beverages for year ending June 30 of year shown. Per capita expenditures at retail store prices. May not add due to rounding.
Source: *National Food Situation*, U.S. Department of Agriculture.

The most notable change in beverage consumption patterns has been the rapid increase for soft drinks. Soft drink consumption jumped in the early 1960s and has been rising rapidly since. Over the twenty year period, per capita soft drink consumption more than doubled, rising 136 percent.

Wine Registers Sharp Gain

Consumption of alcoholic beverages, which accounted for nearly $11 billion of total foodservice industry sales in 1975, also reveals changing patterns. Per person consumption of alcoholic beverages rose 44 percent in the past twenty years, a more rapid pace than for nonalcoholic drinks. After increasing 13.0 percent from 1955 to 1965 per person alcoholic beverage consumption rose 27.4 percent in the following ten years.

Wine registered the most dramatic consumption increase among alcoholic beverages. After a relatively slow 11.0 percent increase from 1955 to 1965, per person wine consumption jumped nearly 73 percent in the following decade. The upward trend in beer consumption is similar but considerably slower paced than that for wine. Per person beer consumption rose by approximately one third from 1965 to 1975 after increasing by only 3 percent in the preceding decade.

The increases for beer and wine occurred mostly in the 1965 to 1975 period. Hard liquor consumption, on the other hand, has been rising for twenty years. After an increase of 30 percent in per person consumption from 1955 to 1965, consumption rose 43.8 percent in the following ten years.

Alcoholic Drinks Account For More Than Half of Beverage Expenditures

Expenditures per person (at retail store prices) for nonalcoholic beverages increased from $55 in 1955 to $138 in 1975 while expenditures for alcoholic beverages increased from $61 in 1955 to $147 in 1975. Thus, alcoholic beverages have accounted for slightly more than half of total beverage expenditures throughout the past two decades.

Expenditures for milk have declined from 25.0 percent of total beverage expenditures in 1955 to 16.9 percent in 1975 while the proportion of beverage expenditures accounted for by coffee dropped from 10.3 percent in 1955 to 4.9 percent in 1975. Soft drinks, which accounted for only 6.9 percent of beverage expenditures in 1955, were responsible for 20.8 percent in 1975, however.

Although the proportion of beverage expenditures allocated to beer declined slightly in the twenty years, beer expenditures accounted for the largest amount, or 24.3 percent, of total beverage expenditures in 1975.

Soft Drinks, An $8 Billion Industry

The value of bottled and canned soft drink industry shipments totaled approximately $7.8 billion in 1976 and is expected to expand by slightly more than 6 percent to $8.3 billion this year, according to the *U.S. Industrial Outlook*. While the value of soft drink shipments rose at an average annual rate of 10.6 percent between 1967 and 1976, wholesale prices averaged 7.4 percent higher yearly in the same period. Thus, the real value of shipments rose at an average annual rate of slightly more than 3 percent.

After a steep climb in 1974 and 1975, soft drink prices increased at a slower pace last year due to a decline in sugar prices and a leveling off in container costs.

Packaged goods accounted for 79 percent of industry sales in 1975 while bulk sales, composed of one to ten gallon containers used in foodservice outlets, made up the remainder. Food stores sold about 53 percent of bottled and canned soft drinks in 1975, vending machines dispensed 21 percent, other retailers, such as eating and drinking places, accounted for 18 percent and all other types of outlets sold the remaining 8 percent of packaged soft drinks.

The accompanying table illustrates the growing importance of dietetic soft drinks which captured 11.2 percent of the market in 1975 up from less than one percent twenty years earlier. Since 1970, kola flavored diet drinks have lost their commanding lead in the dietetic field. In 1975 kola diet drinks captured 5.7 percent of sales while other dietetic flavors accounted for 5.5 percent, more than double the 2.2 percent of sales these drinks were responsible for in 1970.

It is noteworthy that the proportion of diet drinks sold declined substantially after cyclamates were banned and has taken six years to rebuild to levels achieved in 1968-69. This is particularly relevant in light of the current debate about the safety of saccharin in diet beverages.

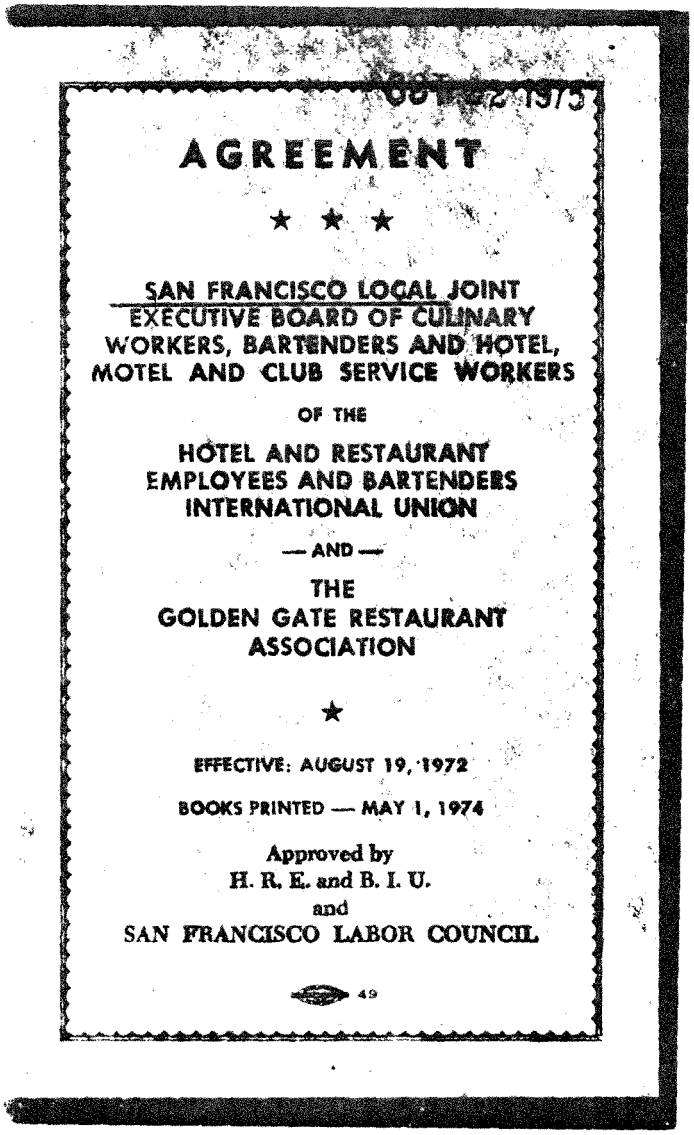
Among regular soft drinks, kola-flavored drinks accounted for a majority or 55.1 percent of sales in 1975, followed by fruit flavored drinks and ginger ale. Both ginger ale and the root beer group declined in importance over the twenty year period as fruit flavored drinks increased somewhat. Most of the increases in proportion of total sales were achieved by diet beverages, however.

The U.S. Department of Commerce predicts that the value of soft drink shipments will grow at an average annual rate of 5.9 percent from 1976 to 1985 exceeding $13.1 billion in 1985. "Soft drinks are likely to remain one of the leading components of the Food and Kindred Products Industries and per capita consumption is expected to continue to rise," states the *U.S. Industrial Outlook*.

Soft drinks by flavor

Year	Nondietetic						Dietetic		
	Kola	Fruit flavored	Root beer, sarsaparilla, cream soda	Ginger ale	Club soda, quinine	Other	Total	Kola	Other
	Percent								
1954	61.4	16.2	4.7	6.1	2.7	8.0	0.9		
1955	61.0	17.0	4.7	6.0	2.6	7.8	0.9		
1956	60.5	17.9	4.6	5.9	2.6	7.5	1.0		
1957	60.0	18.7	4.6	5.8	2.5	7.4	1.0		
1958	59.5	19.6	4.6	5.7	2.5	7.0	1.1		
1959	59.0	19.5	4.2	5.4	2.5	7.2	2.2		
1960	58.5	19.4	3.9	5.1	2.5	7.3	3.3		
1961	58.0	19.3	3.5	4.8	2.4	7.6	4.4		
1962	57.5	19.2	3.1	4.5	2.4	7.9	5.4		
1963	57.0	19.1	2.6	4.2	2.4	8.3	6.4		
1964	56.7	18.4	2.7	4.1	2.4	8.5	7.2		
1965	56.4	17.8	2.8	4.0	2.4	8.6	8.0		
1966	56.0	17.2	2.8	3.7	2.3	9.1	8.9		
1967	55.7	16.8	2.8	3.7	2.3	9.2	9.5		
1968	55.5	16.9	2.8	3.7	2.3	8.8	10.0		
1969	55.3	17.0	2.9	3.6	2.3	8.5	10.4		
1970	55.1	17.2	2.9	3.6	2.3	11.9	7.0	4.4	2.6
1971	54.9	17.4	3.0	3.5	2.2	11.8	7.2	4.6	2.6
1972	54.7	17.6	3.0	3.3	2.2	10.8	8.5	5.8	2.7
1973	54.5	17.7	3.1	3.3	2.2	10.8	8.4	5.5	2.9
1974	51.3	21.2	3.1	3.3	2.2	10.6	8.4	4.4	4.0
1975	55.1	19.3	2.6	3.7	2.2	5.9	11.2	5.7	5.5

May not add to 100 percent due to rounding.
Source: U.S. Department of Agriculture.



OCT 2 1975

AGREEMENT

★ ★ ★

SAN FRANCISCO LOCAL JOINT
EXECUTIVE BOARD OF CULINARY
WORKERS, BARTENDERS AND HOTEL,
MOTEL AND CLUB SERVICE WORKERS

OF THE

HOTEL AND RESTAURANT
EMPLOYEES AND BARTENDERS
INTERNATIONAL UNION

— AND —

THE
GOLDEN GATE RESTAURANT
ASSOCIATION

★

EFFECTIVE: AUGUST 19, 1972

BOOKS PRINTED — MAY 1, 1974

Approved by
H. R. E. and B. I. U.
and
SAN FRANCISCO LABOR COUNCIL

49

Wage increases as follows:

a) May 1, 1977 . . . . . 7% on scale
b) September 1, 1978 . . . . . 6% on scale
c) September 1, 1979 . . . . . 7% on scale
d) September 1, 1980 . . . . . 6% on scale

All percentage increases to be rounded to the nearest nickel.

All percentage increases apply to scale only.

Inequity Adjustments:

Effective September 1, 1977 . . . 50¢ adjustment for full shift dishwashers.

Effective September 1, 1978 . . . 50¢ adjustment for full shift dishups.

JOB CLASSIFICATION AND WAGE SCHEDULE

MANAGERS WORKING AT THE TRADE, HEAD WAITERS, HEAD WAITRESSES, CAPTAINS AND HOSTESSES

	PER DAY — EFFECTIVE				
	9/1/72	1/1/73	1/1/74	1/1/75	1/1/76
	3½%	3½%	5½%	5½%	6%
Managers working at the Trade, Head Waiters or Head Waitresses, or Men or Women in charge of Departments:	No increase on Short-Hours less than 6 hours for the year 1974.				
7½ hours within 8 hours minimum scale	$31.35	$32.40	$34.20	$36.10	$38.25
Captains:					
7½ hours within 8 hours	27.50	28.45	30.00	31.65	33.55
Hostesses:					
7½ hours within 12 hours	27.45	28.40	29.95	31.60	33.50
7½ hours within 8 hours	25.85	26.75	28.20	29.75	31.55
6 hours straight	21.45	22.10	23.30	24.60	26.10
6 hours within 9 hours	22.70	23.45	24.75	26.10	27.65
3 hours or less, straight	12.20	12.60	12.60	13.30	14.10

In case it is found to be in conflict with the law, portion thereof in conflict shall be voided.

CASHIERS AND CHECKERS

	PER DAY — EFFECTIVE				
	9/1/72	1/1/73	1/1/74	1/1/75	1/1/76
Cashiers:	3½%	3½%	5½%	5½%	6%
7½ hours within 12 hours	$23.20	$24.00	$25.30	$26.70	$28.30
7½ hours within 8 hours	21.65	22.40	23.65	24.95	26.45
6 hours straight	18.25	18.95	20.00	21.10	22.35
4 hours straight	13.15	13.60	13.60	14.35	15.20
3 hours or less, straight	11.25	11.65	11.65	12.30	13.05
Checkers:					
7½ hours within 12 hours	25.25	26.10	27.55	29.05	30.80
7½ hours within 8 hours	23.70	24.50	25.85	27.25	28.90
6 hours straight	20.35	21.05	22.20	23.40	24.80
4 hours straight	14.25	14.75	14.75	15.55	16.50
3 hours or less, straight	12.20	12.60	12.60	13.30	14.10
Combination Cashiers and Checkers:					
7½ hours within 12 hours	26.90	27.80	29.35	30.95	32.80
7½ hours within 8 hours	25.50	26.40	27.85	29.40	31.15
6 hours straight	22.20	22.95	24.20	25.55	27.10
4 hours straight	15.10	15.60	15.60	16.45	17.45
3 hours or less, straight (lunch only)	13.15	13.60	13.60	14.35	15.20

WAITERS, WAITRESSES, BUS PERSON

	PER DAY — EFFECTIVE				
	9/1/72	1/1/73	1/1/74	1/1/75	1/1/76
7½ hours within 12 hours	$20.40	$21.10	$22.25	$23.45	$24.85
7½ hours within 8 hours	18.50	19.20	20.25	21.35	22.65
6 hours straight	16.15	16.70	17.60	18.55	19.65
6 hours within 9 hours	17.35	17.95	18.95	20.00	21.20
3 hours or less, straight	10.15	10.50	10.50	11.10	11.75
2 hours or less straight (lunch only)	8.35	8.65	8.65	9.15	9.70

EXTRA WORK

7½ hours within 8 hours	20.50	21.20	22.35	23.60	25.00
6 hours straight	17.55	18.15	19.15	20.20	21.40
4 hours or less, straight	11.80	12.20	12.20	12.90	13.70
Hot Dog Men or Women:					
6 hours or less, straight	23.65	24.45	25.80	27.20	28.85

CASH HOUSES

Waiters, Waitresses, Bus Person:

Applying only to bona fide "Cash Houses" in which the waiters or waitresses collect their checks direct from the customers. Houses in which the customer receives the check from the waiter or waitress but pays same to a cashier, or houses in which the check reads "pay cashier" are not considered "Cash Houses." Cash house scale shall not apply to counter waiters or waitresses.

	PER DAY — EFFECTIVE				
	9/1/72	1/1/73	1/1/74	1/1/75	1/1/76
Steady Work:					
7½ hours within 12 hours	$18.40	$19.05	$20.10	$21.20	$22.45
7½ hours within 8 hours	16.50	17.05	18.00	19.00	20.15
6 hours straight	14.65	15.15	16.00	16.90	17.90
6 hours within 9 hours	15.90	16.45	17.35	18.30	19.40
4 hours straight	11.80	12.20	12.20	12.90	13.70
3 hours or less, straight	9.95	10.30	10.30	10.90	11.55
Extra Work:					
7½ hours within 8 hours	18.50	19.20	20.25	21.35	22.65
6 hours straight	15.70	16.25	17.15	18.10	19.20
4 hours or less, straight	11.80	12.20	12.20	12.90	13.70
3 hours or less (lunch only)	10.80	11.15	11.15	11.75	12.45

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NIGHT CLUBS AND COCKTAIL LOUNGES

(a) No split shifts or short shifts shall be permitted in Night Clubs. No split shifts or short shifts shall be permitted in Cocktail Lounges or Taverns where hot meals are not regularly served.

(b) Employees coming under the jurisdiction of Dining Room Employees Union, Local 9 shall not as a condition of employment be required to perform any duties or work which in whole or in part fall outside the jurisdiction of said Unions.

(c) Waiters or Waitresses shall not be permitted or required to wash or dry bar glasses.

Waiters, Waitresses, Bus Person

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Minimum rate effective September 1, 1972, $16.50; January 1, 1973, $17.05; January 1, 1974, $18.00, January 1, 1975, $19.00; January 1, 1976, $20.15 for seven and one-half (7½) hours or less, plus $1.50 where meals are not provided.

Extra Work:

Minimum Rate Effective September 1, 1972, $18.50; January 1, 1973, $19.15; January 1, 1974, $20.20; January 1, 1975, $21.30; January 1, 1976, $22.60 for seven and one-half (7½) hours or less, plus $1.50 where meals are not provided.

The minimubm rates of pay for all other employees shall be that of seven and one-half (7½) hours straight shift as provided herein under each classification.

PRIVATE PARTIES, BUFFETS, RECEPTIONS, COCKTIAL PARTIES, ETC.

5 hours or less	$18.95	$19.60	$19.60	$20.70	$21.95

BANQUETS

(Where Banquet is involved, the Banquet Rules and Wage Scale shall prevail.)

OUT-OF-TOWN WORK

All work performed by waiters or waitresses at out-of-town parties shall be for six (6) hours of work or less. The time shall be computed as of leaving the city. Employers shall furnish transportation both ways and meals. If the waiter or waitress cannot get back to town the same night, the Employers shall furnish sleeping accommodations. If the waiters or waitresses use their own cars for transportation they shall receive the cost of transportation plus the transportation for each additional passenger they carry.

—60—

The rate of pay shall be per day:

	$20.25	$20.95	$22.10	$23.30	$24.70
	PER DAY — EFFECTIVE				
	9/1/72	1/1/73	1/1/74	1/1/75	1/1/76
Banquet Waiters and Waitresses:					
Breakfast, luncheon, tea, beginning before 4 p.m., 3 hours or less minimum	$10.80	$11.15	$11.15	$11.75	$12.45
Over 20 persons, 50c extra per additional person.					
Dinner, 4 hours or less, minimum	13.70	14.15	14.15	14.95	15.85
Over 15 persons, 60c per additional person.					
Supper parties beginning at 9 p.m. or later, 4 hours or less	15.65	16.20	16.20	17.10	18.15
Over 16 persons, 60c per additional person.					

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DAIRY LUNCHES, SODA FOUNTAINS, CANTEENS AND DOUGHNUT SHOPS HOUSE MANAGERS WORKING AT THE TRADE AND ASSISTANTS

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	PER DAY — EFFECTIVE				
	9/1/72	1/1/73	1/1/74	1/1/75	1/1/76
House Manager working at the Trade, or men or women in charge of departments:					
7½ hours within 8 hours, minimum scale	$31.35	$32.40	$34.20	$36.10	$38.25
Assistant, Afternoon Managers, or Head Fountain Men or Women:					
7½ hours within 8 hours	27.50	28.45	30.00	31.65	33.55
Night Managers and Assistant Managers whose shift commences at 4 p.m. or later:					
7½ hours within 8 hours	28.05	29.10	30.70	32.40	34.35

CARVERS, SALAD OR SANDWICH MEN OR WOMEN:

(When they serve the public directly)

	PER DAY — EFFECTIVE				
	9/1/72	1/1/73	1/1/74	1/1/75	1/1/76
Carvers:					
7½ hours within 8 hours	$25.10	$25.95	$27.40	$28.90	$30.65
Extra Work:					
7½ hours within 8 hours	26.85	27.75	29.30	30.90	32.75
Salad or Sandwich Men or Women:					
Steady Work:					
7½ hours within 12 hours	26.50	27.40	28.90	30.50	32.35
7½ hours within 8 hours	25.10	25.95	27.40	28.90	30.65
6 hours straight	21.35	22.05	23.25	24.55	26.00
3 hours or less, straight	12.75	13.20	13.20	13.95	14.80
Extra Work:					
7½ hours or less within 8 hours	26.85	27.75	29.30	30.90	32.75

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COUNTER, FOUNTAIN, CANTEEN, DOUGHNUT SHOPS, AND SUPPLY MEN OR WOMEN

	PER DAY — EFFECTIVE				
	9/1/72	1/1/73	1/1/74	1/1/75	1/1/76
Steady Work:					
7½ hours within 12 hours	$23.20	$24.00	$25.30	$26.70	$28.30
7½ hours within 8 hours	21.65	22.40	23.65	24.95	26.45
6 hours straight	18.25	18.85	19.90	21.00	22.25
6 hours within 9 hours	19.50	20.15	21.25	22.40	23.75
4 hours straight	13.15	13.60	13.60	14.35	15.20
3 hours or less, straight	10.70	11.05	11.05	11.65	12.35
Extra Work:					
7½ hours or less within 8 hours	23.70	24.50	25.85	27.25	28.90

FAST FOOD OPERATIONS BUS PERSON

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	PER DAY — EFFECTIVE				
	9/1/72	1/1/73	1/1/74	1/1/75	1/1/76
Steady Work:					
7½ hours within 12 hours	$21.35	$22.05	$23.25	$24.55	$26.00
7½ hours within 8 hours	19.70	20.40	21.50	22.70	24.05
6 hours straight	17.00	17.65	18.60	19.60	20.80
6 hours within 9 hours	18.25	18.85	19.90	21.00	22.25
4 hours straight	12.75	13.20	13.20	13.95	14.80
3 hours or less, straight	10.15	10.50	10.50	11.10	11.75
2 hours or less (lunch only)	8.35	8.65	8.65	9.15	9.70

Extra Work:					
7½ hours within 8 hours	21.75	22.50	23.75	25.05	26.55
Doughnut Shop Counter Attendant:					
7½ hours within 8 hours	21.65	22.40	23.65	24.95	26.45
(This classification shall apply to bona fide doughnut shops such as Jim's Doughnuts and Hunt's Doughnut Operations.)					

SERVICE FOUNTAIN

	PER DAY — EFFECTIVE				
	9/1/72	1/1/73	1/1/74	1/1/75	1/1/76
Service Fountain Men or Women (Drive Ins)	$27.80	$28.75	$30.35	$32.00	$33.90
COMBINATION BUS PERSON AND DISHWASHER:					
7½ hours within 8 hours	22.05	22.80	24.05	25.35	26.85
STORE ROOM MEN OR WOMEN:					
7½ hours within 8 hours	23.40	24.20	25.55	26.95	28.55
CRAB OR OUTSIDE STAND MEN OR WOMEN:					
7½ hours within 8 hours	26.40	27.30	28.80	30.40	32.20
VENDING MACHINE ATTENDANT:					
7½ hours within 8 hours	23.65	24.45	25.80	27.20	28.85

OFFICE CLERICAL EMPLOYEES

The rate to remain open and be subject to prior written agreement.

CAFETERIAS

	PER DAY — EFFECTIVE				
	9/1/72	1/1/73	1/1/74	1/1/75	1/1/76
Steady Work					
7½ hours within 12 hours	$21.65	$22.40	$23.65	$24.95	$26.45
7½ hours within 8 hours	20.25	20.95	22.10	23.30	24.70
6 hours straight	17.25	17.85	18.85	19.90	21.10
6 hours within 9 hours	18.50	19.15	20.20	21.30	22.60
3 hours or less, straight	10.70	11.05	11.05	11.65	12.35
SALAD AND SANDWICH ASSEMBLER:					
(Cafeterias ONLY) Where dish-up boys and girls are employed:					
	PER DAY — EFFECTIVE				
	9/1/72	1/1/73	1/1/74	1/1/75	1/1/76
7½ hours within 12 hours	$23.20	$24.00	$25.30	$26.70	$28.30
7½ hours within 8 hours	21.65	22.40	23.65	24.95	26.45
6 hours straight	18.25	18.90	19.95	21.05	22.30
6 hours within 9 hours	19.50	20.15	21.25	22.40	23.75
3 hours or less, straight	11.80	12.20	12.20	12.90	13.70

SALAD GIRLS:					
(Cafeterias ONLY)					
Dishing up salads at counter					
7½ hours within 12 hours	21.65	22.40	23.65	24.95	26.45
7½ hours within 8 hours	20.25	20.95	22.10	23.30	24.70
6 hours straight	17.25	17.85	18.85	19.90	21.10
6 hours within 9 hours	18.50	19.20	20.25	21.35	22.65
3 hours or less, straight	10.70	11.05	11.05	11.65	12.35
FOOD CHECKERS:					
(Cafeterias ONLY)					
7½ hours within 12 hours	24.05	24.85	26.20	27.65	29.30
7½ hours within 8 hours	22.65	23.45	24.75	26.10	27.65
6 hours straight	20.35	21.05	22.20	23.40	24.80
COMBINATION CASHIER & FOOD CHECKERS:					
(Cafeterias ONLY)					
7½ hours within 12 hours	26.20	27.10	28.60	30.15	31.95
7½ hours within 8 hours	24.55	25.40	26.80	28.25	29.95
6 hours straight	22.20	22.95	24.20	25.55	27.10

CRAFT RULES, JOB CLASSIFICATIONS AND WAGE SCHEDULES GOVERNING EMPLOYEES UNDER THE JURISDICTION OF BARTENDERS UNION, LOCAL No. 41

CRAFT RULES

Sections 1, 2, 3, 4, 5 and 6 shall be considered Basic Rules.

Section 1. BUTTONS:

The Bartenders' working button shall be worn on the job at all times.

Section 2. BUSINESS AGENTS' INTERVIEWS:

Business Agents of the Union shall be permitted to investigate the standing of employees or job conditions at any time, provided, however, that no interviews shall be held during the rush hours.

Section 3. EMPLOYMENT AND SEVERANCE:

No worker shall be discharged without "sufficient cause."

(a) The trial period for newly engaged workers shall be twenty-two (22) working days.

(b) Employees discharged without "sufficient cause" who have been in the employ of the Employer at least twenty-two (22) working days, but not more than forty-four (44) working days shall receive one (1) day's pay in lieu of reinstatement.

(c) Employees discharged without "sufficient cause" who have been in the employ of the Employer forty-four (44) working days, but not more than sixty-four (64) working days, shall receive two (2) day's pay in lieu of reinstatement.

(d) Newly engaged workers who have been in the employ of the Employer sixty-four (64) working days shall be considered "steady employees."

(e) Before a "steady employee" may be discharged, the Employer shall give notice to the Union of his intention to discharge and the cause. An opportunity shall be given for joint investigation by the Employer and the Union. No employee shall be discharged unless a mutual agreement between the Employer and the Union shall have been reached.

Section 4. WAIVER OF DUTIES:

No employees coming under the jurisdiction of the Bartenders Union Local 41 shall be required to perform any duties other than coming under the jurisdiction of the Bartenders Union unless the unions involved are first notified and approve such other work.

There shall be no discrimination against any employees for refusing to work outside of their jurisdiction.

Section 5. PICKET LINES:

The observance of any bona fide picket line by an employee shall not be considered a violation of this Agreement.

Section 6. MILITARY SERVICE:

Members of the Union entering the military or naval service, Red Cross or other combat relief service of the U.S.A. during the life of this Agreement, shall be considered on leave of absence and shall retain their seniority while in such service and be returned to their former position upon honorable discharge from the service, provided they are physically and mentally capable of working, and make application within the period specified in the Selective Service Regulations.

Section 7. NOTICE OF TERMINATION OF EMPLOYMENT:

Any employee who is to be laid off or discharged

must be notified at the end of the shift. If this is not done he shall receive a full day's pay.

Section 8. WORK DAY:

(a) Seven and one-half (7½) hours within eight (8) hours shall constitute a day's work or one (1) shift, except as hereinafter provided for.

(b) Any work performed between 6:00 A.M. and 6:00 P.M. in excess of four (4) hours shall constitute a full shift.

(c) Employees working any portion of the time between 6:00 P.M. and 6:00 A.M. shall receive at least one full day's pay.

Section 9. OVERTIME:

All work performed in excess of a day's work or a week's work, or the spread of a week's work, shall constitute overtime and shall be computed at the rate of time and one-half of the regular hourly rate per hour or fraction thereof. Any fraction of an hour overtime shall be computed as a full hour.

Section 10. REPORTING PAY:

When the Employer orders an employee to report to work and said employee is not put to work, he shall receive at least one (1) full day's pay.

Section 11. SALARIES

All salaries shall be paid weekly, or every two (2) weeks with the approval of the Local Joint Executive Board, except for extra employees who shall be paid at the completion of their shift. In the event that an extra employee is not paid on completion of his work he shall be compensated for one (1) hour at the overtime rate.

Section 12. TRANSPORTATION:

Transportation shall be paid by the Employer to and from all jobs outside of city limits.

Section 13. UNIFORMS AND LINENS:

The Employer shall furnish, launder and maintain at no cost to the employee, all uniforms and linens, which uniform shall consist of a jacket or

special uniform If the Employer does not furnish an employee with such uniform, the employee so affected shall receive fifty cents (50c) for each day for which a uniform is not furnished.

Section 14. ACCIDENTAL BREAKAGE:

Unavoidable or accidental breakage or destruction of merchandise or equipment shall not be charged against an employee.

Section 15. DEDUCTIONS AND DONATIONS:

There shall be no fines levied by the Employer or any deductions for any reason whatsoever, from an employee's pay check, except as required by law. There shall be no cash deductions from an employee's pay for any cash shortage where the cash register has not been officially checked by the Employer or his authorized representative in the presence of the employee.

Section 16. HEAD BARTENDER:

Head Bartenders are subject to all work rules governing regular bar men.

Section 17. MEALS:

(a) Any Bartender working a full shift shall receive three (3) meals of food comparable to that served to the customers, or one dollar and one-half ($1.50) in lieu thereof in establishments where no food is served employees by the management.

(b) Employees working in establishments where bona fide hot meals are not served shall receive an allowance of fifty cents (50c) per meal or one dollar and fifty cents ($1.50) for three (3) meals in addition to their wages.

(c) Employees working a full shift shall be given an opportunity to eat within five (5) hours from the commencement of the shift, provided, however, that no employee shall be required to eat before three (3) hours from the commencement of

the shift. Should an Employer require or permit an employee to work so that it is impossible for the employee to take time off for meals as provided, the employee so affected shall be paid in addition to his cash wages the sum of fifty cents (50c) for each meal, plus one (1) hour at the overtime rate for the meal period worked.

Section 18. REGULATIONS & JOB DEFINITION:

No persons but members of the Bartenders Union, Local 41, shall be allowed to perform any or all parts of the duties coming under the jurisdiction of the Bartenders Union, Local No. 41, and this Agreement and Wage Scale, notwithstanding by what title designated.

Excepted from the provisions of this section:

(a) Those persons whose names appear on the ON SALE LIQUOR LICENSE and are reported at the A.B.C. Board to own more than 20% of the business, and limited to three (3) persons.

(b) Principal officers of the Corporate Licensee who are reported at the A.B.C. Board and Corporation Commission of the Corporate Licensee, to own more than 20% of the business, and limited to three (3) persons.

Section 19. ROSTER:

The Employer, upon request, shall furnish a complete roster of employees currently working in the capacity of Bartender and for the preceding thirty (30) days, provided, however, such roster may not be requested more than once in any thirty-day (30) period.

JOB CLASSIFICATIONS & WAGE SCHEDULES

TAVERNS: The Tavern Scale is applicable only to bars operating under a public premises license; no public service personnel other than bartenders are employed; no food is served to the public or to the employees; and no musicians or entertainers are employed.

	PER DAY — EFFECTIVE				
	9/1/72	1/1/73	1/1/74	1/1/75	1/1/76
	3½%	3½%	5½%	5½%	6%
Tavern Bartenders:					
7½ hours within 8 hours	$28.10	$29.05	$30.65	$32.35	$34.30
All Other Bartenders:					
7½ hours within 8 hours	32.15	33.25	35.10	37.05	39.25
Cagemen:					
7½ hours within 8 hours	33.70	34.85	36.75	38.75	41.10
Head Bartenders:					
7½ hours within 8 hours	37.25	38.50	40.60	42.85	45.40
SHORT SHIFT:					
All men working a shift of four (4) hours or less per day between the hours of 6:00 a.m. and 6:00 p.m., provided no shift of four (4) hours or less shall finish later than 6:00 p.m., shall receive not less than:	$23.35	$24.15	$24.15	$25.50	$27.05

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	PER DAY — EFFECTIVE				
	9/1/72	1/1/73	1/1/74	1/1/75	1/1/76
New Year's Eve: Extra Bartenders starting any shift after 4:00 p.m. and working seven and one-half (7½) hours or less shall be paid not less than	$36.05	$37.30	$39.35	$41.50	$44.00
Banquets, Special Occasions, Dances, Opera House, etc:					
(a) One (1) man shall be provided for every fifteen (15) feet of bar length.					
(b) At no time shall a bartender in this classification receive less than the minimum rate of pay per shift of four (4) hours or less.					
(c) For any shift starting after 8:00 p.m. the minimum rate of pay shall apply until 12 midnight; overtime thereafter, plus 50c per shift if Employer does not furnish linen.					
(d) All bartenders in this classification working four (4) hours or less shall be paid not less than:	$25.45	$26.35	$26.35	$27.80	$29.50

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CRAFT RULES, JOB CLASSIFICATIONS AND WAGE SCHEDULES GOVERNING EMPLOYEES UNDER THE JURISDICTION OF MISCELLANEOUS CULINARY EMPLOYEES' UNION, LOCAL No. 110

CRAFT RULES

Section 1. WORK WEEK (Short Hour Employees):

Employees working five (5) hours or less per day may work six (6) days per week.

Section 2. SHIFTS:

(a) Seven and one-half (7½) hours within eight hours shall constitute a shift.

(b) All work performed up to five (5) hours per day shall constitute a short shift.

(c) No employee shall be allowed to work more than one (1) shift in any calendar day if said shift is four (4) hours or more and is performed in the same house.

Section 3. UNIFORMS, LINENS AND TOOLS:

(a) The Employer agrees to furnish, clean, launder and maintain for all employees all uniforms, linens, or tools that are used in his service by an employee. Such uniforms, linens or tools shall remain the property of the Employer at all times.

(b) All employees are entitled to at least one (1) clean uniform and apron each day.

(c) Definition of Uniforms: Men—an apron and jacket or cook's shirt. Women—an apron and smock.

(d) If for any reason the uniforms or linens are not furnished by the Employer, the Employer shall

pay to the employee in addition to his regular compensation, the sum of 50c daily.

Section 4. COMBINATION JOBS:

Any employee working any combination of Dish washer, Vegetableman, or Porter, shall be paid as follows:

		Per Day
Full Shift	Extra	$1.50
2 and 3 Hour Shift	Extra	.50
4 and 5 Hour Shift	Extra	.75

Section 5. ALL OTHER COMBINATION JOBS:

(a) When an employee occupies a position combining two or more classifications in any day he shall be paid for that day at the rate of pay for the highest classification.

(b) Any dishwasher, vegetableman or porter required to do storeroom or supply work for more than one (1) hour per day, shall be paid according to the highest classification.

Section 6. NIGHT SHIFT PREMIUM:

Night shifts starting between the hours of 7:00 P.M. and up to 12 midnight, 75 cents extra. No shifts shall start after 12 midnight or before 4:00 A.M.

Section 7. SPECIAL OCCASIONS:

New Year's Eve: Shifts starting 2:00 P.M. or thereafter:

FULL SHIFT: Time and one-half the hourly straight time rate of a full or short shift, whichever the case may be. All overtime shall be paid for at time and one-half per hour or fraction thereof based on the actual hourly rate received.

Extra Men: Full Shift—$1.00 in addition to the regular scale as specified above. Short Shift—2 or 3 hours, 50c in addition to the regular scale as specified above; 4 to 5 hours, 75c in addition to the regular scale as specified above.

Section 8. EXTRAS: PENALTY RATES NOT IN WAGE SCHEDULE:

(a) Restaurant Dishwasher, Vegetablemen and Porters: Short Shift—75c in addition to short shift scale.

(b) Bar Person and Bar Porters: Full Shift—$1.00 in addition to the regular scale. Short Shift—$0.75 in addition to the regular scale.

(c) Auditoriums, Clubs, Banquets and Sundays: Short Hours—$1.50 in addition to regular rate.

Section 9. OVERTIME:

All classifications shall be paid at the rate of time and one-half of the actual wages received for each hour or fraction thereof for all work performed daily in excess of the regular shift. All classifications shall be paid at the rate of time and one-half of the pay based on the actual wages received for all work performed weekly in excess of the regular week's work. Any fraction of an hour overtime shall be computed as a full hour.

JOB CLASSIFICATIONS & WAGE SCHEDULES

RESTAURANTS

	PER DAY — EFFECTIVE				
	9/1/72	1/1/73	1/1/74	1/1/75	1/1/76
	3½%	3½%	5½%	5½%	6%
Dishwasher, Vegetablemen and Porters:					
Full Shift	$20.40	$21.10	$22.25	$23.45	$24.85
Five (5) hours	14.90	15.40	15.40	16.25	17.25
Four (4) hours	12.75	13.20	13.20	13.95	14.80
Three (3) hours	10.15	10.50	10.50	11.10	11.80
Two (2) hours	8.35	8.65	8.65	9.15	9.70
COMBINATION BUS PERSON DISHWASHER:					
7½ hours within 8 hours	22.05	22.80	24.05	25.35	26.85

PENALTY COMBINATION DISHWASHER & BUS PERSON

Full Shift ..... Extra $1.50
2 and 3 hours ..... Extra $0.50
4 and 5 hours ..... Extra $0.75
The Unions involved must be notified and approve use of this combination shift.

EXTRAS:

Extra Men, full shift	21.55	22.30	23.55	24.85	26.35
DOORMAN (not regularly parking cars):					
7½ hours within 8 hours	22.20	22.95	24.20	25.55	27.10

NIGHT PORTER	23.50	24.30	25.65	27.05	28.65
(The Night Porter classification shall be defined so as to include all combinations of work within the jurisdiction of Local No. 110 without additional compensation and the night shift premium shall not be applicable to this classification)					

BARS AND TAVERNS

	PER DAY — EFFECTIVE				
	9/1/72	1/1/73	1/1/74	1/1/75	1/1/76
Full Shift:					
Service Bar Person (plus 3 meals)	$23.40	$24.20	$25.55	$26.95	$28.55
Bar Person, Bar Porters (plus 3 meals)	22.25	23.00	24.25	25.60	27.15
Short Shifts:					
Two (2) hours (plus 1 meal)	8.75	9.05	9.05	9.55	10.10
Three (3) hours (plus 1 meal)	11.90	12.35	12.35	13.05	13.85
Four (4) hours (plus 1 meal)	14.25	14.75	14.75	15.55	16.50
Five (5) hours (plus 2 meals)	17.00	17.60	17.60	18.60	19.70
EXTRA MEN:					
Auditoriums, Clubs, Banquets					
Sundays:					
Full Shift	21.80	22.55	23.80	25.10	26.60
Out-of-Town					
Full Shift scale only and (transportation)	Open	Open	Open	Open	Open

CRAFT RULES, JOB CLASSIFICATIONS AND WAGE SCHEDULES GOVERNING EMPLOYEES UNDER THE JURISDICTION OF HOTEL, MOTEL & CLUB SERVICE WORKERS UNION, LOCAL NO. 283

CRAFT RULES

Section 1.

All Hat Check employees for Auditoriums, Night Clubs, Restaurants, Race Tracks, Dance Halls, Banquets, etc., must be obtained from Local No. 283.

Section 2. OVERTIME:

Any work performed in excess of the regular shift shall be paid at the rate of time and one-half of the hourly rate per hour or fraction thereof. Any fraction of an hour overtime shall be computed as a full hour.

Section 3. COMBINATION JOBS:

(a) A checker supplying checks shall be paid $1.00 for each shift in addition to the regular rate of pay.

(b) Any checker required to act as cashier in conjunction to checking must be paid $1.70 in addition to the regular rate of pay.

Section 4.

Employees shall keep all tips unless a sign at least six (6) by twelve (12) inches is posted in a conspicuous place stating that tips are not retained by the attendant.

Section 5. MEALS:

One meal shall be provided for all classifications.

	PER DAY — EFFECTIVE				
	9/1/72 3½%	1/1/73 3½%	1/1/74 5½%	1/1/75 5½%	1/1/76 6%
Hat Checkers, Cloak Room Attendants and Cigarette Girls					
7½ hours within 8 hours	$25.40	$26.25	$27.70	$29.20	$30.95
6 hours straight	20.45	21.15	22.30	23.55	24.95
3 hours or less (Restaurant Only)	10.30	10.65	10.65	11.25	11.95
Parlour Maids and Rest Room Attendants:					
4 hours	11.75	12.15	12.15	12.80	13.60
5 hours	14.65	15.15	15.15	16.00	16.95
6 hours	17.40	18.00	19.00	20.05	21.25
7½ hours	20.00	20.75	21.90	23.10	24.50

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KYNER

UNIFORM CONTRACT

between

RESTAURANT-HOTEL EMPLOYERS' COUNCIL
OF SOUTHERN CALIFORNIA, INC.
608 South Hill Street, Suite 1010
Los Angeles, California 90014
(213) 624-7761

and

HOTEL AND RESTAURANT EMPLOYEES
AND BARTENDERS' UNION,
LOCAL 11, AFL-CIO
321 South Bixel Street
Los Angeles, California 90017
(213) 481-8530

March 16, 1975 Through March 15, 1980
(As Amended October 4, 1976
and July 13, 1977)

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Figures in blue meet minimum wage.

SCHEDULE "A"

Hotels, Motels, Restaurants, Clubs and Night Clubs (1978 Wage Rates)

COOKS

	EFFECTIVE 4/1/78 PER DAY
Chef . . . Open . . . Minimum 10% per day above the highest classification rate of pay	
Sous Chef . . . Open . . . Minimum 10% per day above the highest classification rate of pay	
Second Cook Saucier	$39.32
Night Chef	39.32
Pastry Chef	39.32
Second Pastry Chef	34.77
Pastry Cook	32.54
Head Baker	39.32
Second Baker	34.77
Baker	32.54
Roast Cook	37.98
*Carver	37.98
Broiler Cook	37.98
Head Fry Cook	37.98
Fry Cook	34.77
Dish-Up Man	32.54
Head Garde Manger	39.32
Second Garde Manger	34.77
Other Garde Manger	32.54
Head Delicatessen Man	43.81
Delicatessen Man	39.78
Delicatessen Carver	39.78
Combination Delicatessen Man-Frycook (less than 4 hours per day as Delicatessen Man)	37.13
Head Butcher	39.32
Butcher	34.77
Poultry and Fish Butcher	32.54

	EFFECTIVE 4/1/78 PER DAY
Head Pantryman	$34.77
Pantryman	32.54
All Assistants & Helpers	27.09
Vegetable Cook	32.54
First Relief Cook	39.32
Second Relief Cook	34.77
Extra Cook, 8 hours or less	39.32

*Exhibition carving from carts for a majority of the shift.

The Employer may have the option of either furnishing Cooks' uniforms or paying 50¢ per day in lieu thereof, but such linens shall be laundered by the Employer.

Extra Cooks shall be a separate classification with a flat rate of pay for eight hours or less.

Relief Cooks shall be a separate classification with a flat rate of pay for eight hours or less.

Chef and Sous Chef classifications, which are now open, shall be paid a minimum of 10% per day above the highest classification rate of pay.

New Year's Eve, Extra Work	45.45

DINING ROOM EMPLOYEES

Headwaiter or Headwaitress

8 hours or less	29.84
8 hours within 11 split	31.48
4 hours or less	20.40

Captain

8 hours or less	27.32
8 hours within 11 split	29.02
4 hours or less	18.49

	EFFECTIVE 4/1/78 PER DAY
Wine Steward or Semollier	
8 hours or less	$26.56
8 hours within 11 split	28.29
4 hours or less	18.10
SERVICE FOUNTAIN	
8 hours or less	24.79
8 hours within 11 split	26.49
4 hours or less	16.81
FRONT FOUNTAIN	
8 hours or less	20.21
8 hours within 11 split	21.93
4 hours or less	13.62
HEAD BUS BOY AND GIRL	
8 hours or less	19.40
8 hours within 11 split	
Breakfast & Lunch	21.55 ~~21.11~~
Lunch & Dinner	21.11
4 hours or less	13.19
BUS BOY OR GIRL	
8 hours or less	
Breakfast & Lunch	17.72 ~~17.38~~
Lunch & Dinner	17.38
8 hours within 11 split	
Breakfast & Lunch	21.55 ~~20.55~~
Lunch & Dinner	20.80 ~~19.60~~
4 hours or less	11.81
WAITERS OR WAITRESSES — HOTELS AND RESTAURANTS	
8 hours straight shift	
Breakfast & Lunch	17.72 ~~17.38~~
Lunch & Dinner	17.38

	EFFECTIVE 4/1/78 PER DAY
8 hours within 11 split	
Breakfast & Lunch	~~$20.35~~
Lunch & Dinner	~~19.00~~
6 hours straight shift	
Lunch	~~14.09~~
Dinner	~~14.09~~
6 hours within 11 split	
Breakfast & Lunch	~~15.36~~
Lunch & Dinner	~~14.09~~
Dinner	
4 hours or less	9.95
Lunch	
3 hours or less	8.11
Breakfast, 3 hours or less —	
Room Service Waiter	9.65

Extra Work: $2.00 per day above scale. On all split shifts, minimum call for lunch is 3 hours.

Waiters or Waitresses — Night Club & Cocktail Lounges — All Straight Shifts

8 hours or less	
Breakfast & Lunch	~~17.38~~
Lunch & Dinner	17.38
6 hours or less	
Lunch	~~14.09~~
Dinner	~~14.09~~
4 hours or less	9.95
New Year's Eve Extra Work	33.65

Short-shift employees working on the sixth day under the provisions of Section 9 (D) (2) shall be paid at the rate of $2.50 per hour.

Head Hostess or Host

8 hours or less	27.32
8 hours within 11 split	$ 29.02
4 hours or less	18.49

Hostess or Host

8 hours or less	24.10
8 hours within 11 split	25.74
4 hours or less	16.17

Cashier

8 hours or less	24.10
8 hours within 11 split	25.74
4 hours or less	16.17

Food Checker

8 hours or less	26.33
8 hours within 11 split	27.98
4 hours or less	17.74

Combination Cashier and Food Checker

8 hours or less	26.33
8 hours within 11 split	27.98
4 hours or less	17.74

Cart Man or Woman*

8 hours or less	21.85

*Applies to employees who sell or deliver food or beverages from a portable cart to areas outside the dining room such as to offices in an office building.

House Officers, Male or Female

8 hours or less	23.94

DOOR ATTENDANTS

8 hours or less	19.40
6 hours or less	16.00

Extra Work: $2.00 per day above scale. Short-

...daff employees who work on the seventh consecutive day shall be paid at the rate of double time as per Section 9-E.

New Year's Eve Extra Work $33.65
Night Shift Differential $2.00 per day above scale (All employees except extra cooks).

WAITERS OR WAITRESSES – BUS BOYS OR BUS GIRLS – BANQUETS

	EFFECTIVE 4/1/78 PER DAY
Breakfast, Luncheon or Tea Beginning before 4:00 P.M., 3 hours or less, minimum	$ 9.65
Dinner, 4 hours or less minimum	12.24
Dinner-Dance, 8 hours or less	17.89

Compensation for all hours worked in excess of the above designated minimum shift hours shall be at the rate of $2.50 per hour, except that work performed in excess of eight hours per day shall be paid at the rate of one and one half (1½) times the regular rate of pay.

Except for French Service, waiters or waitresses required to serve more than twenty (20) guests shall be paid 26¢ per person in excess of this limit for breakfast, luncheon or tea, and 32¢ per person in excess of this limit for dinner.

When Banquet Waiters or Waitresses are called upon to serve another banquet, they shall be paid the full rate of another party, as per wage schedule. This provision applies to all cases where the two banquets are held during different hours, but does not apply when the two banquets are served simultaneously during the same banquet shift. Banquet waiters and waitresses shall not be required to

set up more than the number assigned to them to serve, nor shall they be required to clear off more than the number given them to serve.

On French Service at banquets, the limit on number of guests served shall be 15 and waiters and waitresses required to serve more than 15 guests shall receive the above contract excess allowance rates per guest. The preceding paragraph is also applicable to French Service.

On all banquets the Employer shall maintain a record and require supervisory or executive employes to maintain a record of the total gratuities paid and received by the employer or by any supervisory or executive employee and such records shall be made available to the Union on request. This does not apply where the customer gives the gratuity in cash and the Employer has no knowledge thereof.

On Banquet – Scrip parties, or banquets where no gratuities are provided for in the charge, and where no food is served, pay shall be $3.00 per day above the banquet scale and the Employer will be responsible up to $3.00 above scale less gratuities received.

BARTENDERS

	EFFECTIVE 4/1/78 PER DAY
Working Head Bartender highest classification rate (minimum 10% above the rate of pay) – duties include assigning bartender to stations	Open
Bartender	$35.30
*Service Bartender	37.95
Bar Boy	24.17
Extra Work (Bartender) $2.00 per day above bartenders' scale.	
New Year's Eve Extra Work	45.45
Bartender, 4 hours or less	26.61
*Service Bartender, 4 hours or less	28.60

No short shift bartender shall be permitted to work a split shift or two shifts in the same day.
*Service Bartender is a Bartender whose regular duties exclude direct service to customers except during occasional relief periods. The classification also covers any Bartender who is required to perform any clerical work beyond that which is necessary to balance the cash register at the end of the shift.

MISCELLANEOUS KITCHEN AND RESTAURANT EMPLOYEES

	EFFECTIVE 4/1/78 PER DAY
Assistant Kitchen Steward	$24.31
Storekeeper	24.31
Head Dishwasher	24.31
Dishwasher	22.96
Vegetable Man	22.96
Porter	22.96
Silverman	22.96
Glasswasher	22.96
Potwasher	22.96
Combination Dishwasher, Potwasher or Vegetable Man	22.96
Miscellaneous Kitchen Employee	22.96
Extra Work	$2.00 per day above scale
New Year's Eve Extra Work	27.98
Night Shift Differential	$2.00 per day above scale

DRIVE-INS, DAIRY LUNCHES AND CAFETERIAS

Cooks

Dinner Cooks	37.52
Pantry Chef	37.52
Second Pastry Chef	33.05
Pastry Cook	30.84

	EFFECTIVE 4/1/78 PER DAY
Roast Cook	$ 36.41
*Carver	36.41
Fry Cook	33.28
Dish-Up Man	30.84
Head Garde Manger	37.52
Second Garde Manger	33.05
Other Garde Manger	30.84
Head Butcher	37.52
Butcher	33.05
Poultry and Fish Butcher	30.84
Head Pantryman	33.05
Pantryman	30.84
First Relief Cook	37.52
Second Relief Cook	33.05
Vegetable Cook	30.84
Wheel Man	33.05
Cook's Helper	25.44
Extra Cook	37.52

*Exhibition carving from carts for majority of shift.
The Employer may have the option of either furnishing Cooks' uniforms or paying 50¢ per day in lieu thereof; but such linens shall be laundered by the Employer.

MISCELLANEOUS EMPLOYEES

All Miscellaneous Kitchen Classifications	21.33
Extra Work	$2.00 per day above scale

CAFETERIAS — WAITERS AND WAITRESSES

CAFETERIA LINE SERVERS

8 hours or less	19.54
8 hours within 11 split Breakfast & Lunch	21.55 ~~21.27~~
Lunch & Dinner	21.27
4 hours or less	13.19

EFFECTIVE 4/1/78 PER DAY

CASHIER

8 hours or less	24.10
8 hours within 11 split	25.74
4 hours or less	16.17

CHECKER

8 hours or less	26.33
8 hours within 11 split	27.98
4 hours or less	17.74

COMBINATION CASHIER AND CHECKER

8 hours or less	26.33
8 hours within 11 split	27.98
4 hours or less	17.74

SERVICE FOUNTAIN MAN OR WOMAN

8 hours or less	22.96
8 hours within 11 split	24.79
4 hours or less	15.57

BUS BOY OR GIRL

8 hours or less	17.89
8 hours within 11 split	
Breakfast & Lunch 21.55	~~20.35~~
Lunch & Dinner 20.80	~~19.60~~
4 hours or less	12.17

SUPPLY BOY OR GIRL

8 hours or less	18.87
8 hours within 11 split	
Breakfast & Lunch 21.55	~~20.35~~
Lunch & Dinner 20.80	~~19.91~~
4 hours or less	12.82
Extra work $2.00 per day above scale	

EFFECTIVE 4/1/78 PER DAY

DAIRY LUNCHES — WAITERS AND WAITRESS

COUNTER MAN OR WOMAN

8 hours or less	$21.05
8 hours within 11 split	22.07
4 hours or less	14.34

BUS BOY OR GIRL

8 hours or less	17.89
8 hours with 11 split	
Breakfast & Lunch 21.55	~~20.35~~
Lunch & Dinner 20.80	~~19.60~~
4 hours or less	12.17

SUPPLY BOY OR GIRL

8 hours or less	18.87
8 hours within 11 split	
Breakfast & Lunch 21.55	~~20.35~~
Lunch & Dinner 20.80	~~19.91~~
4 hours or less	12.82
Extra Work $2.00 per day above scale	

DRIVE-INS — WAITERS AND WAITRESSES

SERVICE FOUNTAIN MAN OR WOMAN

8 hours or less	22.96
8 hours within 11 split	24.79
4 hours or less	15.57

FRONT FOUNTAIN MAN OR WOMAN

8 hours or less	18.71
8 hours within 11 split	
Breakfast & Lunch 21.55	~~20.35~~
Lunch & Dinner 20.80	~~19.62~~
4 hours or less	12.55

COMBINATION WAITRESS AND FOUNTAIN

8 hours or less	18.71

		EFFECTIVE 4/1/78 PER DAY
8 hours within 11 split		
Breakfast & Lunch	21.55	~~$20.35~~
Lunch & Dinner	20.80	~~19.62~~
4 hours or less		12.55

BUS BOY OR GIRL

8 hours or less		17.89
8 hours within 11 split		
Breakfast & Lunch	21.55	~~20.35~~
Lunch & Dinner	20.80	~~19.00~~
4 hours or less		12.17

CAR HOP

8 hours or less		
Breakfast & Lunch	17.72	~~16.60~~
Lunch & Dinner	16.97	~~15.85~~
8 hours within 11 split		
Breakfast & Lunch	21.55	~~20.35~~
Lunch & Dinner	20.80	~~19.60~~
4 hours or less		10.73
Extra Work	$2.00 per day above scale	

PASTRY AND CONFECTIONERY COUNTER EMPLOYEES

Head Pastry and Confectionery Counter Employees	24.79
Pastry & Confectionery Counter Employees	21.71
Trainee Pastry and Confectionery Counter Employees	19.62
Extra Work	$2.00 per day above scale

OFF-THE-PREMISES CATERING, OUT-OF-TOWN BANQUETS, BARBECUES, PICNICS AND PRIVATE CATERING

	EFFECTIVE 4/1/78 PER DAY
Cooks	$47.45
No short shifts. No split shifts. Minimum call, eight (8) hours.	
The Minimum Scale of pay for catering work shall be as follows:	
Captain or Head Hostess 8 hours or less	32.24
Waiter or Waitress 8 hours or less	25.02
Miscellaneous Kitchen Employees	26.28
No short shifts. No split shifts. Minimum call eight (8) hours.	
Bartenders	39.78
Service Bartenders	47.90
No short shifts. No split shifts. Minimum call, eight (8) hours.	

HOTEL AND MOTEL SERVICE WORKERS

Bell Service Department

Working Bell Captain	19.87	~~18.75~~
Stationary Desk Captain (male or female)	19.87	~~18.75~~
*Bellman	19.87	~~18.75~~
Bell-Garage Runner Combination	19.87	~~18.75~~
Bell-Elevator Combination	19.87	~~18.75~~
Bell-Package or Page Combination	19.87	~~19.77~~
Page Boy or Girl	19.87	~~18.75~~
Package Boy or Girl	19.87	~~18.75~~
Bell-Baggage Porter Combination	19.87	~~Open~~

*Duties normally assigned within the hotel industry. Combination jobs shall be paid appropriate combination rate set forth above. Bellman shall not be required to perform maid duties.

All Bell Service Department employees shall be provided at least two uniforms of coat and pants, or jacket and pants, or heavy uniform type shirt and pants per week.

HOUSEKEEPING DEPARTMENT

	EFFECTIVE 4/1/78 PER DAY
Assistant Housekeeper	$23.42
Inspectress or Floor Housekeeper	21.85
Linen Room Worker	21.32
Seamstresses-Menders	21.32
Drapery Seamstress	22.62
Powder Room Maid	20.96
*Maids	20.96
Head Houseman	24.31
**Houseman	22.96
Banquet Houseman	22.96
Handyman	25.53
Patrolman	23.51
Storeroom Man-Receiving Clerk	24.31
Combination Bellman-Houseman	22.96
Combination Linen Room-Clerical (applicable to employees who spend four or more hours doing linen room work)	23.13

*Maids perform general room cleaning and bed-making and other duties as usually performed in the hotel industry.

**Housemen perform general cleaning and other duties as usually performed in the hotel industry. Housemen shall not be requested to perform other jurisdiction craft work, such as painters, plumbers and operating engineers.

When employees are requested to work on their regular days off, they shall be notified by the Employer the day before except in cases of emergency. Should employees be unable to work on such days off because of making other plans they shall not be terminated, suspended or penalized in any manner.

Housekeeping Department females, excluding Assistant Housekeeping and Secretary to Housekeeper, shall be provided a minimum of at least two uniforms per week. Houseman shall be provided with at least two uniforms, smocks or slacks or overalls, or jackets and pants per week.

HOTEL FRONT OFFICE DEPARTMENT (Including Telephone Department)

Group I

	EFFECTIVE 4/1/78 PER DAY
Key, Mail and Information Clerk — File Clerk, General Clerk Typist	$28.30

Group II

Room Clerk, Reservation Clerk, Room-Reservation Clerk, Front Office Cashier, Night Auditor Billing and Voucher Clerk Room Clerk-Telephone PBX (Combination)	$31.74

Group III

Accounting Clerk, Food and Beverage Clerk, Bookkeeping Machine Operator, Stenographer or Steno-Typist	$34.36

	EFFECTIVE 6/1/78 PER DAY
Group IV	
Telephone-PBX Operator	$24.07
Circuit or Message	24.07
Working Chief PBX Operator	26.73
Working Chief Supervisor	26.73
(If works 2 or more hours in shift as PBX Operator)	26.73
Working PBX Supervisor	26.73

A Telephone Operator who does not receive her lunch period away from her board because of the nature of her shift shall receive a balanced meal plus $2.00 per day above scale; if no meal is available, $2.50 shall be paid.

1. Front Desk classifications required to handle and do business that involves receiving and disbursing funds, such as room rent, room service charges and other normal hotel charges shall not be held responsible for shortages of funds unless it can be shown that such loss or shortage is caused by a dishonest or willful act or by gross negligence of the employee.

2. Employees authorized by management to accept checks will not be held responsible for checks honored in the normal course of business or if such checks represent insufficient funds, etc., unless it can be shown that said loss or shortages is caused by a dishonest or willful act or by gross negligence of the employee.

3. Pursuant to the provisions of Section 11 of the Agreement, in the case of all Hotel and Motel Service Workers' Classifications, all uniforms and linens shall be furnished and laundered by the Employer without cost to the employee; at the option of the Employer, he may pay 50¢ per day or $2.50 per week in lieu of laundering or cleaning. In applying these provisions to Hotel and Motel Service Workers' Classifications, "uniforms and linens" mean any apparel specified by the Employer to be worn by employees in the service of the Employer; also note above specific provisions under Bell Service and Housekeeping Departments.

4. For purpose of applying Paragraph E of Section 9 of the Agreement to Hotel and Motel Service Workers' Classifications, all hotels shall be deemed to be seven day operations entitling such employees to two (2) consecutive days off in each period of seven (7) consecutive days or else the penalty on overtime provisions of said Paragraph E shall be applied, except where a department is operating six (6) days as defined in Section 9 E.

No split shifts.

No short shifts.

Night shift Differential
(Work starting at or after 8:00 P.M. in all classifications) ..... $2.00 per day above scale

Extra Work
(in all classifications) . $2.00 per day above scale

New Year's Eve Extra Work ..... $3.00 above scale

Extra work differential is applicable to all extra employees hired to work less than four days per calendar week, and to all Maids assigned to work less than four days per calendar week.

THE
COUNCIL AGREEMENT
1973-1977

★

RESTAURANT-HOTEL EMPLOYERS' COUNCIL OF SAN DIEGO, INC.
233 A Street, No. 405
San Diego, California 92101
Telephone 234-3443

and

LOCAL JOINT EXECUTIVE BOARD OF SAN DIEGO

Comprising

WAITERS AND BARTENDERS UNION LOCAL NO. 500
3911 Pacific Highway
San Diego, California 92110
Telephone 297-0353

and

CULINARY ALLIANCE AND HOTEL SERVICE EMPLOYEES UNION LOCAL NO. 402
1020 Eighth Avenue
San Diego, California 92101
Telephone 239-9201

11/1/75 - 10% increase

6/1/77 - 7% increase

1/1/79 - 7% increase

11/1/75 - 10%
6/1/77 - 7%
11/1/79 - 7%
INCREASE

RESTAURANT-HOTEL EMPLOYERS' COUNCIL OF SAN DIEGO, INC. AND LOCAL JOINT EXECUTIVE BOARD OF SAN DIEGO comprising WAITERS AND BARTENDERS UNION LOCAL NO. 500 and CULINARY ALLIANCE AND HOTEL SERVICE EMPLOYEES UNION LOCAL NO. 402.

SCHEDULE "A"

MINIMUM WAGE SCALES PER SHIFT

	Effective Date 11-1-73	11-1-74
KITCHEN AND STOCKROOM EMPLOYEES		
Executive Chef	$Open	$Open
Sous Chef or Night Chef	29.29	30.83
Dinner or Second Cook	27.62	29.06
Banquet Chef	29.29	30.83
Working Chef (See Section—"Craft Relief and Working Chef Rules")		
Night Cook—after 8 p.m. or before 4 a.m.	25.97	27.32
Garde-Manger	24.30	25.52
Roast or Broiler Cook	25.97	27.32
Fry Cook	24.30	25.52
All Cooks not given separate or distinct title	24.30	25.52
Meat Butcher	24.73	26.02
Fish and/or Poultry Butcher	24.30	25.52
Pastry Chef	27.62	29.06
Second Pastry Cook	24.30	25.52
Head Baker	27.62	29.06
Second Baker	24.30	25.52
Head Pantry	23.07	24.27
Pantry	21.41	22.58
Helpers to all types of Cooks, Bakers, Butchers and Pantry	19.82	20.85
Head Vegetable Preparation	21.50	22.62
Vegetable Preparation	18.18	19.13
Kitchen Steward	21.50	22.62
Head Storeroom	19.43	20.44
Combination Receiving Clerk and/or Backdoor	17.76	18.69
Storeroom—Straight Shift	16.93	17.81
Storeroom—Split Shift	18.58	19.46
Head Dishwasher—Straight Shift	19.19	20.69
Head Dishwasher—Split Shift	20.84	21.84
Dishwasher—Straight Shift	17.62	18.54

	Effective Date 11-1-73	11-1-74
Dishwasher—Split Shift	19.27	20.19
Potwasher—Straight Shift	18.40	19.36
Potwasher—Split Shift	20.05	21.05
Porter—Straight Shift	17.76	18.69
Silver—Straight Shift	17.76	18.69
LUNCH AND DINING ROOM EMPLOYEES		
Headwaiter/Maitre d'—Straight Shift	23.07	24.27
Headwaiter/Maitre d'—Split Shift	24.72	25.92
Captain/Headwaitress—Straight Shift	21.41	22.53
Captain/Headwaitress—Split Shift	22.06	23.18
Host/Hostess—Straight Shift	17.76	18.69
Host/Hostess—Split Shift	19.41	20.34
Head Busboy or Head Busgirl—Straight Shift	18.91	19.90
Head Busboy or Head Busgirl—Split Shift	20.56	21.55
Busboy or Busgirl—Straight Shift	17.33	18.23
Busboy or Busgirl—Split Shift	18.98	19.88
Fountain Manager	22.78	23.97
Hotel Service Fountain Dispenser	18.61	19.58
Combination Fountain Dispenser and Waiter or Waitress	15.52	16.33
Waiter or Waitress—Straight Shift	13.59	14.30
Waiter or Waitress—Split Shift	15.24	15.95
Waiter or Waitress—6 hrs. Straight or less	11.11	11.69
Waiter or Waitress—6 hrs. Split Shift	12.76	13.34
Breakfast and Lunch Waiter or Waitress—Straight Shift	13.59	14.30
Lunch Waiter or Waitress—3 hrs. or less	6.41	6.74
Dinner Waiter or Waitress—4 hrs. or less	7.93	8.34
Dinner and/or Dance Waiter or Waitress	16.72	17.64
Car Hop—Straight Shift	13.59	14.30
Waiter or Waitress—AA Hotel Nightclubs and AA Hotel Cocktail Lounges—Straight Shift	13.59	14.30
Waiter or Waitress—Banquets in Hotel and AA Restaurant—4 hrs. or less—Dinner	9.72	10.24
Waiter or Waitress—Banquets in Hotel or AA Restaurant—3 hrs. or less—Lunch and Breakfast	7.57	7.96

	Effective Date 11-1-73	11-1-74
Cashier (Food or Bar)—Straight Shift	18.18	19.13
Cashier (Food or Bar)—Split Shift	19.92	20.78
Food Checker—Straight Shift	18.18	19.13
Food Checker—Split Shift	19.92	20.78
Combination Food Checker and Cashier—Straight Shift	18.18	19.13
I.D. Checker—Doorman-Doorgirl—Straight Shift	18.18	19.13
Host/Hostess-Cashier-Checker—4 hrs. or less	10.44	11.00
FOUNTAIN AND STAND EMPLOYEES		
Fountain Dispenser—Straight Shift	18.61	19.58
Combination Fountain Dispenser and Fountain Waiter or Waitress—Straight Shift	15.81	16.63
Standman and/or Standwoman—Straight Shift	19.70	20.73
CAFETERIA EMPLOYEES		
Head—Straight Shift	21.10	22.20
Combination Cashier-Checker—Straight Shift	18.18	19.13
Combination Cashier-Checker—6 hrs.	14.07	14.80
Combination Cashier-Checker—4 hrs.	9.61	10.11
Cafeteria Carver—Straight Shift	20.37	21.43
Cafeteria Carver—6 hrs.	15.76	16.58
Cafeteria Carver—4 hrs.	10.78	11.34
Dish-Up—Straight Shift	16.52	17.38
Dish-Up—6 hrs.	12.77	13.43
Dish-Up—4 hrs.	8.71	9.17
Busboy or Busgirl—Straight Shift	17.83	18.23
Busboy or Busgirl—6 hrs.	13.38	14.08
Busboy or Busgirl—4 hrs.	9.13	9.61
Supply—Straight Shift	16.93	17.81
Supply—6 hrs.	13.07	13.75
Supply—4 hrs.	8.94	9.41
Vegetable Peeler—Straight Shift	16.93	17.81
BARTENDERS AND COCKTAIL LOUNGE EMPLOYEES		
Head Bartender—Straight Shift	31.36	33.00
Bartender—Straight Shift	26.81	28.21
Bartender—Service Bar, serving one or more Waiters or Waitresses—Straight Shift	28.07	29.53
Barboy or Bargirl—Straight Shift	19.15	20.15
Beer Bartender—Straight Shift	23.07	24.27

	Effective Date 11-1-73	11-1-74
BARTENDERS: SPECIAL SHORT SHIFTS		
(Older Bartenders are to be used where available)		
Cocktail Bartenders—4 hrs. or less	18.45	19.41
Service Bartenders—4 hrs. or less	20.13	21.18
HOUSEKEEPING AND SERVICE DEPARTMENT EMPLOYEES		
Head Desk Clerk and/or Night Auditor-Room Clerk	Open	Open
Front Office and Room Clerk—Straight Shift	21.39	22.50
Front Office Cashier, Mail, Information and Key Clerk—Straight Shift	20.19	21.24
Chief Telephone Operator—Straight Shift	18.11	19.06
Chief Telephone Operator—Split Shift	19.76	20.71
Telephone Operator—Straight Shift	16.88	17.76
Telephone Operator—Split Shift	18.53	19.41
All front office personnel shall receive one meal or $1.00 in lieu thereof. Telephone Operators who do not receive their lunch period away from their board because of the nature of the shift shall receive a balanced meal plus $1.00 per day above scale. If no meal is available, $1.50 shall be paid.		
Bell Captain (Working)—Straight Shift	12.47	13.11
Bells—Straight Shift	11.69	12.30
Night Bells—Straight Shift	13.16	13.85
Housekeeper (Working)—Straight Shift	18.57	19.54
Maid—Straight Shift	16.88	17.76
Inspector or Assistant Housekeeper—Straight Shift	18.57	19.54
Linenroom—Straight Shift	17.71	18.63
Sewing—Straight Shift	17.71	18.63
Head House Man or Woman—Straight Shift	19.15	20.15
House Man or Woman—Straight Shift	16.64	17.51
Vacuum Man or Woman—Straight Shift	16.64	17.51
Porter—Straight Shift	17.47	18.38
Checkroom—Straight Shift	17.47	18.38

	Effective Date 11-1-73	11-1-74
Combination Bell and Elevator Operator—Straight Shift	16.64	17.51
Combination Bell and Driver—Straight Shift	Open	Open

MOTELS

Head Maintenance—Straight Shift	28.04	29.50
Assistant Maintenance—Straight Shift	22.60	23.78
Gardener—Straight Shift	22.60	23.78
Pool Attendant—Straight Shift	19.78	20.82
Outside Utility—Straight Shift	19.78	20.82
Pitch and Putt Golf Course Employees: Grass Maintenance—Straight Shift	28.04	29.50
Assistant Grass Maintenance—Straight Shift	22.60	23.78

NOTICE:

If work is performed on the seventh (7th) day, it shall be paid at the overtime rate of time and one-half the regular rate of pay in accordance with the provisions of Section 10 of this Agreement.

PENSION PLAN:

Contributions (now 3c per hour) shall be seven cents (7c) effective November 1, 1973. (Section 25).

AFFIRMATIVE ACTION/TRAINING PROGRAM:

Contribution by Employer (Section 3, j and k) shall be one cent (1c) per hour effective November 1, 1974.

E X H I B I T G

78-227

BERNHARD v. HARRAH'S CLUB (1976) 16 C. 3d 313

Plaintiff: Richard A. Bernhard

Defendant: Harrah's Club, a Nevada Corporation;
Fern Myers and Philip Myers, not named as defendants, but patrons of defendant club and the persons who were involved in the accident with plaintiff.

The Issue on Appeal:

The issue is the civil liability of defendant tavern keeper to plaintiff, a third person, for injuries allegedly caused by defendant's selling and furnishing alcoholic beverages in the State of Nevada to an intoxicated person who subsequently injured plaintiff in the State of California. (There are two states involved, California and Nevada. California is plaintiff's residence and domicile, the place of injury, and the place of forum. Nevada is the place of defendant's residence and the place of the wrong, i.e., defendant's conduct.)

Proceeding in the Trial Court:

Plaintiff filed a case consisting of one count alleging:

1. Defendant's owning and operating a gambling establishment in the State of Nevada in which intoxicating liquors were sold or furnished for consumption on the premises;

2. Defendant's advertising and soliciting in California for the business of California residents;

3. Defendant's knowledge and expectation that many California residents would use the public highways going to and from defendant's drinking establishment;

4. In response to defendant's advertising and solicitations, Fern and Philip Myers drove from their California residence to defendant's gambling and drinking club;

5. During their stay at defendant's club, the Myers were served numerous alcoholic beverages by defendant's employees, to a point of obvious intoxication, rendering them incapable

of safely driving a car. Defendant's employees continued to serve and furnish the Myers alcoholic beverages beyond this point;

6. While intoxicated, Fern Myers drove the Myers' car from Nevada into California;

7. Fern Myers, while still intoxicated, drifted across the center line and collided head-on with plaintiff, a resident of California, who was driving his motorcycle along a California highway;

8. As a result of the collision, plaintiff suffered severe injuries;

9. Defendant's sale and furnishing of alcoholic beverages to the Myers, who were intoxicated to the point of being unable to drive safely, was negligent and the proximate cause of plaintiff's injuries.

To this complaint, defendant filed a general demurrer based upon the following contentions:

1. Nevada law denies recovery against tavern keeper by third persons for injuries which result from the furnishing of alcoholic beverages to an intoxicated person who inflicts such injuries;

2. Nevada law governed the case since the alleged tort was committed by defendant in Nevada;

3. Section 25602 of the California Business and Professions Code, which established the duty necessary for liability pursuant to Vesely v. Sager (1971) 5 Cal. 3d 153, was inapplicable to a Nevada tavern. The statute does not have extra-territorial jurisdiction.

The trial court sustained the demurrer without leave to amend and entered a judgment of dismissal. Plaintiff appealed from the judgment of dismissal.

Facts:

1. On July 24, 1971, Fern and Philip Myers were guests of defendant establishment, remaining until early morning hours of July 25, 1971.

During the stay at defendant's establishment, the Myers became intoxicated as a result of consuming alcoholic beverages provided by defendant. These alcoholic beverages were given to the Myers even after they were obviously intoxicated;

2. While in an intoxicated state, the Myers returned to the State of California proceeding northeasterly on Highway 49, near Nevada City;

3. The automobile was driven by Fern Myers and drifted across the center line into the lane of oncoming traffic, colliding head-on with plaintiff's motorcycle.

Conclusions of the Court:

The issue is the choice of law between the States of Nevada and California. The Court concluded:

> " . . . [U]pon reexamining the policy underlying California's rule of decision and giving such policy a more restrained interpretation for the purpose of this case pursuant to the principles of the law of choice of law discussed above, we conclude that California has an important and abiding interest in applying its rule of decision to the case at bench, that the policy of this state would be more significantly impaired if such rule were not applied and that the trial court erred in not applying California law." (Bernhard, supra. p. 323.)

Therefore, the Court chose California law.

The Court then discussed the imposition of liability outside of statute, determining that the Business and Professions Code Section 25602 is not applicable to the Nevada defendant. The Court further concluded:

> "Although we chose to impose liability on the Vesely defendant on the basis of his violating the applicable statute, the clear import of our decision was that there was no bar to civil liability under modern negligence law. Certainly, we said nothing in Vesely indicative of an intention to retain the former rule that an action at common law does not lie." (Bernhard, supra. p. 325.)

The Court looked to Civil Code Section 1714, which is the general statement of negligence law, and stated:

> "It bears repetition that the basic policy of this state set forth by the Legislature in section 1714 of the Civil Code is that everyone is responsible for an injury caused to another by his want of ordinary care or skill in the management of his property." (Bernhard, supra. p. 325.)

Pursuant to Bernhard, there is liability to injured third persons on the part of a provider of liquor to the person causing the injury apart from Business and Professions Code section 25602, i.e., under common law negligence principles. Although Vesely v. Sager (1971) 5 C. 3d 153 looked to Business and Professions Code section 25602 to establish the "duty" element in that case, Bernhard makes it clear that there is a duty apart from statute. This distinction also influences the parties' burdens of proof. Under Vesely, and pursuant to Evidence Code Section 669, once plaintiff establishes the existence of the elements set forth in such statute, the defendant has the burden of proof of the non-existence of the presumed fact, whereas in Bernhard, the plaintiff has the burden of proof of the elements supporting a cause of action in negligence.

78-231

COULTER, ET AL. v. SUPERIOR COURT (1978) 21 C. 3d 144

Petitioner: James Stewart Coulter, Deborah Coulter (husband and wife)

Respondent: Superior Court of San Mateo County

Real Parties in Interest:

Schwartz & Reynolds & Co., apartment complex owner and operator;
Monte Montgomery, apartment manager

Matter on Appeal:

Whether noncommercial suppliers of alcoholic beverages may be liable to third persons injured by reason of the intoxication of the consumer of those beverages.

The matter is not appealed from the trial court; rather, the petitioners are seeking a writ of mandate from the Supreme Court to the trial court compelling the trial court to overrule the demurrers to petitioner's complaint and proceed with the trial on all causes of action.

Proceeding in the Trial Court:

Plaintiffs filed a complaint.

A. First Cause of Action

1. Plaintiff was injured when the car in which he was riding as a passenger collided with roadway abutments in San Mateo County. (The plaintiff's wife joined in the action claiming as damages the loss of consortium and the value of nursing services.)

2. At the time of the accident, the automobile was being driven by Janice Williams, whose intoxication caused the accident and the injuries to the plaintiff;

3. Before the accident, the defendant (real party in interest) Schwartz & Reynolds was the owner and operator of an apartment complex and defendant (and real party in interest) Monte Montgomery was the apartment manager;

4. Defendants (real parties in interest) negligently and carelessly served to Janice Williams extremely large quantities of alcoholic beverages in defendants' recreation room;

5. Defendants knew or should have known Williams was becoming excessively intoxicated;

6. Defendants knew or should have known that Williams customarily drank to excess and was incapable of exercising the same degree of volitional control over her consumption as the average reasonable person;

7. Defendants knew that Williams intended to drive a motor vehicle following consumption of alcoholic beverages furnished by defendants;

8. Defendants knew or should have known that their conduct would expose third persons such as plaintiffs to foreseeable serious risk of harm;

B. Second Cause of Action

The second cause of action was substantially identical to the first, except that defendants were not charged with furnishing of the alcoholic beverage, but rather that defendant (Schwartz & Reynolds & Co.) permitted Williams to be served alcoholic beverages on its premises, and that defendant (Montgomery) aided, abetted, participated, and encouraged Williams to drink to excess.

The third and fourth causes of action need not be discussed.

To the first and second causes of action, defendant demurred and such demurrers were sustained without leave to amend. Petitioners seek mandate compelling the trial court to overrule the demurrers and to proceed with trial on the issues.

Facts:

1. Defendant apartment complex had a recreation room in which alcoholic beverages were being served by the apartment manager, Monte Montgomery;

2. Janice Williams consumed alcoholic beverages furnished by defendant Monte Montgomery and became drunk;

3. Janice Williams operated a motor vehicle in which James Coulter, plaintiff, was a passenger. The vehicle collided with a roadway abutment.

Conclusions of the Court:

1. " . . . [A] social host who furnishes alcoholic beverages to an obviously intoxicated person, under circumstances which create a reasonably foreseeable risk of harm to others, may be held legally accountable to those third persons who are injured when that harm occurs . . ." (Coulter v. Superior Court [1978] 21 C. 3d 144, at ___).

2. Business and Professions Code "section 25602 is not limited by its terms to persons who furnish liquor to others for profit." (Coulter, supra. p. ___).

3. " . . . [W]ell established general negligence principles lead us to conclude, independently of statute, that a social host or other non-commercial provider of alcoholic beverages owes to the general public a duty to refuse to furnish such beverages to an obviously intoxicated person if, under the circumstances, such person thereby constitutes a reasonably foreseeable danger or risk to third persons . . ." (Coulter, supra. p. ___).

4. " . . . Since all commercial vendors of alcoholic beverages in the state must be licensed (see section 23300 et seq.), the use of the broader term 'person' in section 25602 strongly suggests that the latter section must have been intended to apply whether or not the supplier of such beverages was engaged in commercial, and therefore licensed, activities." (Coulter, supra. p. ___).

5. " . . . [T]he term 'person' within the meaning of section 25602 is not limited to those who are commercial suppliers, but includes those who are social hosts as well." (Coulter, supra. p. ___).

6. " . . .[W]e conclude that section 25602 affords a sufficient statutory basis upon which civil liability may be imposed upon a noncommercial supplier who provides alcoholic beverages to an obviously intoxicated person, thereby creating a reasonably foreseeable risk of harm to third persons." (Coulter, supra. p. ___).

7. "Wholly apart from the provisions of section 25602, imposition of civil liability in the present case is fully compatible with general negligence principles." (Coulter, supra. p. ___).

8. " . . . We think it evident that the service of alcoholic beverages to an obviously intoxicated person by one who knows that such intoxicated person intends to drive a motor vehicle creates a reasonably foreseeable risk of injury to those on the highway." (Coulter, supra. p. ___).

Discussion:

The Court discussed the evolution of liability of one who furnishes alcoholic beverages to another person. Originally, the furnisher of the alcoholic beverage was not liable for damages resulting from the latter's intoxication based upon the rationale that it was not the sale or gift of the liquor that was the proximate cause of the injury, but its use. However, as is pointed out in Vesely v. Sager, supra., the Court reconsidered its earlier position and found that commercial vendors would be liable for injuries to third parties by the consumer of liquor. Utilizing the doctrine of negligence per se, the Vesely Court found "duty" on the part of the furnisher of the alcoholic beverage as a result of Business and Professions Code section 25602 and Evidence Code section 669. Evidence Code section 669 is the codification of negligence per se establishing a presumption of negligence if there is a violation of a statute and the injury that occurs is the type to be avoided, and the person injured is a member of the class of persons sought to be protected by this statute. In Coulter, the Court found that section 25602 also applied to the gratuitous provision of alcoholic beverages by noting that the section refers to "every person" as contrasted with the preceding Business and Professions Code (section 25601) which refers to "licensee". Applying Business and Professions Code section 23008, the Court defined "person" as any individual, firm, co-partnership, et cetera. "Licensee" was defined by Business and Professions section 23009 as any person holding a license issued by the department. The Court then pointed out that since all of the commercial vendors of alcoholic beverages must be licensed, the term "person" as used in section 25602 suggests that the latter section must be intended to apply to any furnisher of liquor whether commercial or non-commercial. This conclusion was reinforced by reference to other

Business and Professions code sections. Ultimately, the Court concluded that section 25602 applied to noncommercial supplying of alcoholic beverages. The Court also stated "We think it of some, but not controlling, significance that, following Vesely, the Legislature has failed to amend section 25602 to exclude such liability." (Coulter, supra. p. ___). The Court stated further, " . . . Our interpretation of section 25602 in authorizing imposition of civil liability is entirely consistent with these broad legislative policies, and may well further induce social hosts to take those reasonable preventive measures calculated to reduce the risk of alcohol-related accidents." (Citations omitted.) (Coulter, supra. p. ___).

After determining that Business and Professions Code section 25602 was applicable to the noncommercial supplier of alcoholic beverages, the Court looked to the common law to see if it would also impose liability on the noncommercial vendor . . . "Wholly apart from the provisions of section 25602, imposition of civil liability in the present case is fully compatible with general negligence principles. It is true that in Vesely we based the requisite duty to the plaintiff upon the provisions of section 25602 alone. (Citations omitted.) However, as we recently explained in Bernhard v. Harrah's Club (1976) 16 Cal. 3d 313, although we chose to impose liability on the Vesely defendant on the basis of his violating the applicable statute, the clear import of our decision was that there was no bar to civil liability under modern negligence law." (Citations omitted.) (Coulter, supra. p. ___).

Reinforcing the conclusion with statistical information relative to alcohol-related automobile accidents, the Court concluded " . . . We think, in short, that the policy of preventing future harm identified by us in Rowland (Rowland v. Christian [1968] 69 C. 2d 108) is served by requiring the exercise of reasonable restraint by the social host under the circumstances herein presented." (Coulter, supra. p. ___).

The term "obviously intoxicated", it was argued, is too broad and subjective to serve as a satisfactory measure for the imposition of civil liability. (Business and Professions Code section 25602 refers to the "obviously intoxicated" person.) Answering the argument, the court said, "The use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known outward manifestations which are 'plain' and 'easily seen or discovered'. If such outward manifestations exist and the seller still serves the customer so affected, he has violated the law, whether this was because he failed to observe what was plain and easily seen or discovered, or because, having observed, he ignored that which was apparent." (Citations omitted.) (Coulter, supra. p. ___).

Completing the historical and social analysis, the Court issued the peremptory writ of mandate directing the lower court to overrule the demurrers to the first cause of action of plaintiff's complaint. The majority opinion was written by Justice Richardson and concurred in by Justices Tobriner and Manuel. Justice Mosk concurred in a separate opinion stating that the application of Business and Professions Code section 25602 was too rigid. " . . . [I]n order to hold liable the social provider of liquor, it is not enough to rely upon the provisions of section 25602. The plaintiff should be compelled to prove either (1) that the social host furnished the liquor knowing that it was likely to, and that it did, produce the original intoxication, or (2) that the additional liquor served to one already 'obviously intoxicated' increased or prolonged the existing state of intoxication and to that extent was a proximate cause of the injury." (Coulter, supra. p. ___).

Justice Newman, concurring and dissenting, said that he agreed as to the first cause of action, but dissented as to the holding regarding the second cause of action failing to survive a demurrer because he felt that encouraging and participating in an obviously intoxicated person's drinking should result in the same liability as furnishing alcoholic beverages.

Justice Clark dissenting would like to return to the old law of no liability for the furnisher of alcoholic beverages.

In summary, the state of the law as to liability of the furnisher of alcoholic beverages to an obviously intoxicated person is: the furnisher, whether commercial or noncommercial, can be liable to third parties injured by the intoxicated person. The Coulter decision did not specifically address the noncommercial furnisher's liability to the consumer. I would anticipate that under the same facts as Ewing v. Cloverleaf Bowl (1978) 20 Cal. 3d 389, the Court would find the gratuitous furnisher liable to the injured consumer.

78-237

EWING v. CLOVERLEAF BOWL (1978) 20 Cal. 3d 389

Plaintiffs: Robert Ewing and Anthony Ewing (sons of decedent Christopher Ewing) by Catherine Ewing (their mother and former wife of decedent Christopher Ewing)

Defendant: Cloverleaf Bowl, a California Corporation (a bowling alley located in Fremont, California)

Issue Before the Court on Appeal:

The appeal was based upon the trial court's granting defendant's motion for a non-suit. At the close of the plaintiffs' presentation of evidence, the trial court granted such motion, dismissed the jury, and entered a judgment for defendant. The question on appeal is whether the trial court erred in taking the factual determination from the jury. The answer to the central issue depends upon the answers to some subordinate issues.

1. Whether a jury, if it could conclude that the defendant bartender's conduct breached its duty of care to decedent, could also conclude that such conduct amounted not only to negligence but willful misconduct;

2. Whether a jury, in assessing decedent's conduct, could:

   a. Reasonably conclude that decedent's conduct amounted to no more than contributory negligence, or

   b. Whether they must conclude that decedent's conduct amounted to willful misconduct.

Proceedings in the Trial Court:

After plaintiffs presented their evidence, the defendant moved for a non-suit. The trial court granted such non-suit and a judgment based upon such non-suit. Defendant appeals from such judgment. The granting of the non-suit was based on the determination by the trial court that, as a matter of law, the decedent's conduct amounted to contributory negligence and the bartender defendant's employee's conduct did not

constitute willful misconduct. (Aside: Although this case was decided after Li v. Yellow Cab, the trial took place before the Supreme Court decision in Li became final. Li was applicable only to cases in which trial had not begun before that final date. Had Li been applicable, the court would have been discussing the conduct of the parties in terms of comparative negligence.)

Facts:

1. Date and Time -- early evening, April 13, 1971;

2. Location -- a bowling alley located in Fremont, California, called Cloverleaf Bowl;

3. Decedent Christopher Ewing was celebrating his 21st birthday on that date;

4. Prior to going to Cloverleaf Bowl, decedent and friends left decedent's parents' house for defendant Cloverleaf Bowl to celebrate decedent's birthday;

5. Decedent with others arrived at the Cloverleaf Bowl sometime between 8:30 p.m. and 9:00 p.m. on April 13, 1971;

6. There were two bars in the Cloverleaf Bowl. One was a large cocktail lounge and the other a service bar near the bowling lanes;

7. Defendant's bartender had eleven and one-half years experience as a bartender;

8. When decedent arrived at the bar, defendant bartender requested identification and upon discovering that it was decedent's birthday, gave decedent a vodka collins on the house. Decedent allegedly said, "I'm 21 and I'm not even drunk." A friend stated, "I'll give you something that will make you drunk" and at that point such friend requested the defendant's bartender to give decedent the strongest drink in the house;

9. The drink was 151 proof rum. Most other liquors served at the bar were either 86 proof or 100 proof;

10. It was necessary for the bartender to leave the service bar and go to the larger bar in order to obtain the 151 proof rum;

11. The bartender served decedent a shot glass of straight rum (151 proof). The glasses in which the rum was served are marked with a white line indicating 7/8 of an ounce. The bartender filled such glass to the brim. Before decedent consumed the liquor, he was warned by a friend that it was a very strong drink. In spite of such warning, decedent consumed the full shot immediately. After the third round, defendant's bartender warned decedent to "take it easy on this stuff, it's going to catch up with you and knock you for a loop."

12. Decedent was also warned by his female companion and decedent replied, "I'll be alright."

13. Decedent was served four additional shots of rum (seven thus far) and was manifesting glassy eyes and slurred speech and redness of face. Again, decedent was warned by his female companion and decedent stated, "I'll be alright."

14. When decedent returned to the bar, he was again served three more glasses of rum.

15. The bartender was required to remove the bottle of rum from the shelf each time he poured decedent a drink.

16. At 10:00 p.m., decedent's older brother and such brother's wife arrived at the defendant bar and saw the condition of decedent. Decedent requested an additional drink for himself and his brother. However, his brother interrupted and stated that decedent had had enough, walked decedent to a table where decedent passed out.

17. Decedent's brother and friend dragged him from defendant establishment, and brought him to the home of his mother and stepfather. The following morning his mother discovered decedent dead.

18. At the time of autopsy, a physician, Dr. Allen McNie, sampled the decedent's blood and found it to have a blood alcohol content of .47 percent. According to said doctor, at .20 percent a casual observer will be able to detect signs that a person is drunk. Between .30 and .40 percent, a person will begin to become comatose and if the level of the blood alcohol exceeds .42 percent, the person will die as a result of paralysis of the centers of the brain controlling heart rhythm and respiration. The analysis of decedent's

blood indicated that his blood alcohol was .47 percent, and that decedent died of acute alcohol poisoning.

19. Taking into account the decedent's weight, the amount of food he had eaten, and other factors, Dr. McNie determined that decedent must have drunk 21.6 ounces of 86 proof liquor, 18.6 ounces of 100 proof liquor, or 11.2 ounces of 151 proof liquor.

Issues in the Trial Court:

In order for the non-suit to be sustained, the trial court may grant such motion only if the plaintiff's evidence would not support a jury verdict in plaintiff's favor. In making its determination, the Court must view plaintiff's evidence in its most favorable light insofar as plaintiff's case is concerned, and must view defendant's representative's conduct as unfavorably as the evidence will permit.

Since willful misconduct is alleged, that term must be defined. The Court stated that willful misconduct "implies the intentional doing of something either with knowledge, express or implied, that serious injury is a probable, as distinguished from a possible, result, or the intentional doing of an act with a wanton and reckless disregard of its consequences." (Ewing, supra. p. 402.)

"If conduct is sufficiently lacking in consideration for the rights of others, reckless, heedless to an extreme, and indifferent to the consequences it may impose, then, regardless of the actual state of the mind of the actor and his actual concern for the rights of others, we call it willful misconduct . . ." (Ewing, supra. p. 402.)

In view of the foregoing, the Court concluded:

1. The bartender plainly acted intentionally in serving the liquor to decedent;

2. The bartender knew the significance of the differences in proof. He knew the specific drink he was serving, and probably knew that the decedent was an inexperienced drinker;

3. The bartender knew that decedent intended to get drunk and that decedent probably did not fully comprehend the implication of the high potency liquor he was drinking.

The bartender should have concluded that decedent might consume an amount of liquor hazardous to his health.

4. The bartender acted in violation of two rules of practice at defendant's bar and continued to serve decedent after he was manifestly intoxicated. In view of this, the bartender acted intentionally, aware of the health hazard created by decedent.

The Court then analyzed the conduct of decedent. The decedent intended to get drunk, but he did not intend to consume a fatal overdose of alcohol. Although a prudent man may have inquired into the consequences of differences of proof, decedent's failure to do so did not rise to the level of recklessness.

In summary, the reasonable jury could conclude that the decedent was merely negligent. Thus, if the plaintiffs were to establish willful misconduct by the defendant, contributory negligence would not be a bar unless the decedent assumed the risk of alcohol poisoning. The Court concluded that decedent did not assume the risk of acute alcohol poisoning.

The Court concluded "even assuming the negligence of the young patron, a jury could very well find willful misconduct on the part of the bartender; such conduct would remove the bar of contributory negligence. A jury could also very well conclude that, while contributorily negligent, the youthful patron did not assume the risk of acute alcohol poisoning, the risk of his own death." (Ewing, supra. p. 407.)

Discussion:

The Court discussed the former law with regard to the liability of bartenders for injuries caused by the sale of liquor to intoxicated customers. As the Court points out, this was not treated as a question of fact; rather, under the doctrine of Cole v. Rush (1955) 45 Cal. 2d 345, bartenders were not liable as a matter of law since the decisions maintained as a matter of law consumption of alcoholic beverages and not the provision was the proximate cause of an injury to an intoxicated customer or to third parties who are injured by intoxicated customers. The Court pointed out that in Vesely v. Sager (1971) 5 Cal. 3d 153, "under the . . . principles of proximate cause, it is clear that the furnishing of an alcoholic beverage to an intoxicated person may be a proximate cause of injuries . . ." The Court explained how liability could be found under various theories. "In Vesely, which came before us on the pleadings, we held that, if defendant had violated Business and Professions Code Section 25602, which classifies as a misdemeanor the sale of alcoholic beverages to 'any obviously intoxicated person', plaintiff, under Evidence Code Section 669, could rely upon Section 25602 as the source of defendant's duty of care." (Ewing, supra. p. 400.)

(Aside: Evidence Code Section 669 provides for the establishment of a presumption of negligence if the conditions set forth in the statute are established. As stated in the statute, the presumption is that a person failed to exercise due care. The conditions are:

1. Violation of a statute or other regulation of a public entity;

2. Such violation proximately caused the injury;

3. Such injury was a result of an occurrence the statute or regulation was designed to prevent;

4. The injured person was one of a class of persons for whose protection the statute or regulation was adopted.

The Court stated that in Vesely liability was imposed on a basis of Evidence Code Section 669 and Business and Professions Code Section 25602, that is, violation of an applicable statute. However, the Court points out that they did not intend to limit liability to a violation of a statute and there was no bar to civil liability under modern negligence law. The Court held "that Vesely and Bernhard govern regardless of whether a third party injured by an intoxicated customer or a customer himself sues a bartender: the bartender's liability in both circumstances depends upon the application of the principle that an individual is liable for foreseeable injuries caused by his failure to exercise reasonable care. As we noted at the outset, the application of this principle turns on the facts of each case." (Ewing, supra. pp. 400-401.)

The Bernhard case to which the Court refers is Bernhard v. Harrah's Club (1976) 16 Cal. 3d 313.

Because the pleadings in the case alleged willful misconduct, the Court was required to define willful misconduct. (See page 402 of the opinion.) The Court also discussed assumption of risk and stated that "to determine whether there is a 'voluntary acceptance of the risk', we must identify the specific 'danger involved', and judge the individual's 'knowledge and appreciation' of that danger . . . Before the doctrine is applicable, the victim must have not only general knowledge of a danger, but must have knowledge of the particular danger, that is, knowledge of the magnitude of the risk involved . . . Under ordinary circumstances the plaintiff will not be taken to assume any risk of either activities or conditions of which he is ignorant." (Ewing, supra. p. 406.)

The Court in Ewing disapproved of three other appellate court decisions insofar as they were in conflict with the decision in Ewing. On page 401, footnote 8, the Court states "two courts have declared, even after Vesely, that the drinking of alcoholic beverages and not the serving is the proximate cause of any injury that results to the drinker from his own intoxication . . ." (Citing Rose v. International Brotherhood of Electrical Workers [1976] 58 Cal. App. 3d 276, 279; accord, Cooper v. National Railroad Passenger Corp. [1975] 45 Cal. App. 3d 389, 393.) To the extent that the decisions in Rose and Cooper rest on the obsolete proximate cause fiction, we disapprove of them. We also disapprove of Kindt v. Kauffman (1976) 57 Cal. App. 3d 845, insofar as dicta in the majority opinion in that case (citations omitted) suggest that bartenders owe no duty of care to their patrons."

Therefore, the state of the law after Ewing appears to be that the liability of the bartender or the owner of the drinking establishment can be established under general negligence principles or pursuant to negligence per se for violation of 25602 of the Business and Professions Code. Using negligence per se, there is a presumption that arises once the elements of Evidence Code Section 669 are established. That presumption is a presumption affecting the burden of proof and therefore imposes upon the defendant the burden of proof as to the non-existence of the presumed fact. (See Evidence Code Section 606.) However, under ordinary negligence, the plaintiff still has the burden of proof to show the duty, the breach of the duty, actual cause, proximate cause, and injuries or damages.

VESELY v. SAGER (1971) 5 C. 3d 153

Plaintiff: Miles A. Vesely

Defendants: William A. Sager and William A. Sager doing business as the Buckhorn Lodge;

James G. O'Connell, and Earl Dirks

(Note: The only defendants involved in the appeal are William A. Sager and William A. Sager doing business as the Buckhorn Lodge.)

The Issue on Appeal:

Whether civil liability may be imposed upon a vendor of alcoholic beverages for providing alcoholic drinks to a customer who, as a result of intoxication, injures a third person?

Proceeding in the Trial Court:

Plaintiff's complaint alleged:

1. Defendant Sager's ownership and operation of Buckhorn Lodge;

2. The location of the Lodge near the top of Mount Baldy in San Bernardino County;

3. The serving of defendant O'Connell by defendant Sager of alcoholic beverages in large amounts;

4. The knowledge of defendant Sager that defendant O'Connell was becoming excessively intoxicated;

5. Knowledge by Sager that defendant O'Connell was incapable of exercising volitional control over his consumption of alcoholic beverages in the same manner as an average reasonable person;

6. Sager's knowledge that the only route leaving the Buckhorn Lodge was a steep, winding narrow road that defendant O'Connell was going to drive;

7. With such knowledge, defendant Sager continued serving defendant O'Connell alcoholic beverages past the normal closing time of 2:00 a.m. until 5:15 a.m.;

8. After leaving the Lodge, defendant O'Connell drove down the road, veered into the opposite lane and struck plaintiff's vehicle.

To this complaint, defendant Sager demurred on the ground "the seller of intoxicating liquor is not liable for injuries resulting from intoxication of a buyer thereof." The trial court sustained the demurrer without leave to amend and granted defendant's motion to strike and dismiss the complaint as to defendant Sager. The plaintiff appealed stating that the appeal was from the order sustaining the demurrer without leave to amend and the order granting the motion to strike. As the Court points out, both of these are not appealable orders. Subsequent to the notice of appeal, the trial court entered an order dismissing the action as to defendant Sager. The Supreme Court treated the notice of appeal as applying to the order dismissing the action.

Facts:

1. Date and time -- approximately 10:00 p.m. on April 8, 1968, until 5:15 a.m. on April 9, 1968;

2. Location -- the accident occurred on a windy, mountain road leading from the top of Mount Baldy in San Bernardino County;

3. Defendant Sager served defendant O'Connell large quantities of alcoholic beverages;

4. Sager's knowledge:

   a. Defendant O'Connell was becoming excessively intoxicated;

   b. O'Connell was incapable of exercising volitional control over his consumption of intoxicants as an average reasonable person;

5. O'Connell drove down the road leading from the Buckhorn Lodge and after veering into the opposite lane, struck plaintiff's vehicle;

6. Plaintiff was injured.

Conclusions of the Court:

" . . . The traditional common law rule would deny recovery on the ground that the furnishing of alcoholic beverages is not the proximate cause of the injury suffered by a third person. We have determined that this rule is patently unsound and that civil liability results when a vendor who furnishes alcoholic beverages to a customer in violation of Business and Professions Code Section 25602 and each of the conditions set forth in Evidence Code Section 669(a) is established." (Vesely v. Sager (1971) 5 C. 3d 153-157.)

Discussion:

The Court pointed out that the rationale for the common law rule denying recovery was that the consumption and not the providing of liquor was the proximate cause of the injury sustained as a result of intoxication. The rationale was based upon what was determined to be the obvious fact that one cannot be intoxicated by reason of liquor furnished if he does not drink it.

The Court pointed out that the common law rule has been substantially abrogated in many states by statutes which specifically impose civil liability on the furnisher of intoxicating liquor. The Court reviewed the case law of California relative to historical treatment of this matter, looked at other jurisdictions and stated "a substantial number, if not a majority, have decided that the sale of alcoholic beverages may be the proximate cause of such injuries and that liability may be imposed upon the vendor in favor of the injured third person." (Vesely v. Sager, supra. p. 161.) The Court cited a New Jersey Supreme Court case where it was stated, "where a tavern keeper sells alcoholic beverages to a person who is visibly intoxicated or a person he knows or should know from the circumstances to be a minor, he ought to recognize and foresee the unreasonable risk of harm to others through action of the intoxicated person or the minor." (Vesely, supra. pp. 162-163.)

Looking at the matter in terms of negligence principles and concepts of proximate cause, the Court stated "insofar as proximate cause is concerned, we find no basis for a distinction founded solely on the fact that the consumption of an alcoholic beverage is a voluntary act of the consumer and is a link in the chain of causation from the furnishing of the beverage to the injury resulting from intoxication. Under the above principles of proximate cause, it is clear that the furnishing of an alcoholic beverage to an intoxicated person may be a proximate cause of injuries inflicted by that individual upon a third person. If such furnishing is a proximate cause, it is so because the consumption, resulting intoxication, and injury-producing conduct are foreseeable intervening causes, or at least the injury-producing conduct is one of the hazards which makes such furnishing negligent." (Vesely, supra. p. 164.) However, the Court said that the central question

is not one of proximate cause, but rather one of "duty" and whether defendant Sager owed a duty of care to the plaintiff or a class of persons of which he is a member. The opinion said that duty may be found in a legislative enactment which does not provide for civil liability. " . . . In this state a presumption of negligence arises from the violation of a statute which was enacted to protect a class of persons of which the plaintiff suffered as a result of the violation of the statute" (Vesely, supra. p. 164.), citing Evidence Code Section 669 in support of the proposition. Looking to Business and Professions Code Section 25602, the Court found that a duty of care is imposed upon the defendant Sager by that section, through Section 23001 stating "one of the purposes of the Alcoholic Beverage Control Act is to protect the safety of the people of this state. Moreover, our interpretation of Section 25602 finds support in the decisions of those jurisdictions in which similar statutes, and statutes prohibiting the sale of alcoholic beverages to minors, have been found to have been enacted for the purpose of protecting members of the general public against injuries resulting from intoxication." (Vesely, supra. p. 165.)

Lastly, the Court discussed an issue concerning a motion to strike. Discussion of that issue is omitted since it is not pertinent. Ultimately the Court found liability on the basis of negligence per se through Evidence Code Section 669 and Business and Professions Code Section 25602. The finding related to a vendor's liability to a third person injured as a result of the intoxication of a customer. The Court found proximate cause because the consumption, resulting intoxication, and injury-producing conduct are foreseeable intervening causes.

Duty of care and standard of conduct required of a reasonable man were found in Business and Professions Code section 25602.

Since the issues were not before the Court, the members declined to determine whether a noncommercial furnisher of alcoholic beverages (i.e., social host) may be subject to civil liability or whether the customer served in violation of Business and Professions Code Section 25602 may recover for injuries.

As of this case, the state of the law was that a commercial furnisher of alcoholic beverages could be civilly liable to a third person under the doctrine of negligence per se.

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GOVERNMENT LIABILITY

GOVERNMENT LIABILITY

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I

HISTORICAL AND PHILOSOPHICAL BASIS OF GOVERNMENT LIABILITY

Historically, no suit was allowed against federal or state governments without their consent (Cohens v. Virginia, 50 U. S. 386, 389 [1821]). This rule was based on the English common law precept that "the kind can do no wrong" (Prosser, Law of Torts, [1971] 4th Ed., at 971). This precept in turn was based on the metaphysical notion that the kind was the fountain and head of justice and equity could not presume him to be defective in either.[1]

The divine right of kings' rationale was obviously outmoded when the colonies formed a union to be governed by and for the people, but reassessment of the rule came slowly. It was not until 1946 that the federal government eliminated the general rule of governmental immunity by enacting the Federal Government Tort Claims Act.[2]

In California, the rule was first scrutinized when in 1961 the courts decided Muskopf v. Corning Hospital, (1961) 55 Cal.2d 211. That decision stated what was then probably a growing view that "the rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia" (Id. at 216).

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[1]Pawlett v. Attorney General, (1668) Hadres 465, 468, 145 Eng. Rep. 550, 552; Dyson v. Attorney General, (1912) 1 K.B. 410, 415.

[2]28 U.S.C.A. Sections 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680.

The California Legislature in 1963 enacted the California Tort Claims Act (see, Cal. Stats. 1963, ch. 1681, §1). That Act cuts from the immunity rule seven bases for liability: 1) liability for torts of employees (Calif. Government Code §815.2); 2) liability for acts of independent contractors (Calif. Government Code §815.4); 3) liability for breach of mandatory duty (Calif. Government Code §815.6); 4) liability for dangerous conditions of public property (Calif. Government Code §835); 5) liability for negligent operation of motor vehicles (Calif. Vehicle Code §17001); 6) liability for creation or maintenance of a nuisance (Civil Code §3479, and 7) liability for taking or damaging private property for public use (Art. I, §19, California Constitution).

The enactment of the California Tort Claims Act, however, did not end the debate of immunity versus liability or, even if it were agreed that liability should exist, the scope of that liability remains in dispute.[3] Those in favor of immunity argue that governmental funding and decision making needs protection and they add that with the passing of Proposition 13, there is even greater need to protect government's limited resources.[4] Those against immunity and in favor of government liability advocate the need for deterrence

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[3]G. Schwartz, "Report to the California Commission on Tort Reform," (unpublished paper on file with the Joint Committee on Tort Liability office).

[4]Joint Committee on Tort Liability, "Government Liability Transcript of Hearing," October 31, 1977; Advisory Committee on Government Liability "Minutes and Materials from July 31, 1978, meeting" (on file in Committee office).

Thus, from a philosophical standpoint, the controversy can be characterized as a question of who should bear the burden for injuries caused by a governmental entity and, if it is decided the government should, then the question becomes one of the scope of that burden.

What follows is an attempt to find an answer to the question through analyses of the presently available risk management procedures, the existing substantive rules of liability and immunity and also the existing procedural rules, the damages available, the problems arising when multiple parties are involved, and finally, the funding available to the governmental entities to compensate for government tort losses.

II

RISK MANAGEMENT

A. Definition. Risk management may be defined as the logical and deliberate analysis of exposure to risk in order to identify those risks of operations, and to reduce the following to eliminate, diminish and manage those risks: 1) risk avoidance; 2) risk transfer; 3) loss prevention; 4) loss management, and 5) risk funding.

B. Standards. Presently, there are several entities and private agencies which have risk management programs. These agencies have formed the Public Agency Risk Managers Association. The Joint Committee on Tort Liability requests authorization to ask these entities and agencies to present model standards for risk management for development and implementation by the public

entity. It is the opinion of the staff of the Joint Committee on Tort Liability that no such program should be mandated because of the limitation of public financial resources due to Proposition 13.

C. Effective Implementation of a Risk Management Program. Instead of mandating any risk management program, the staff of the Joint Committee feels that implementation of such a system should be entirely optional. However, to encourage the implementation of such a program, it is suggested that the following procedural benefits be given. Under Government Code Section 946.6, in order to file a late claim, a plaintiff must not only show due diligence in pursuit of the claim but also must show prejudice on the governmental entity. It is the recommendation of the Committee staff that those entities that adopt a risk management program be entitled to the late claims statute as it is exists in current law. For those entities which do not implement a risk management program, a claims statute based merely on the showing of prejudice to the entity, and not due diligence on the part of plaintiff, should be required. Case authority in California requires only substantial compliance with the claims procedure. It is suggested that strict compliance be required where a risk management program is ongoing, and merely substantial compliance where there is no such program.

The reason supporting such benefits with regard to a risk management program is that such a program provides early notice of an accident. If a risk management program involves prevention as well as control of the loss, the link between the risk management program and the claims statute is obvious.

D. Reporting Requirements. Under Government Code Section 6663 and Insurance Code Sections 12389 and 12958, the local government section of the insurance commissioners office shall collect loss data from insurers of public entities and each insurer shall report the following information:

1. The total number of insureds written during the immediately preceding calendar year;

2. The total amount of premiums received from insureds, both written and earned, during the immediately preceding calendar year;

3. The number of claims reported to the insurer for the first time, separately by the year the claim occurred, and the number of claims reported closed during the previous calendar year which were reopened separately by the year claim occurred;

4. The total number of claims outstanding, together with the monetary amount reserved for loss and allocated loss expense, in the annual statement as of December 31 of the calendar year next preceding, separately stated by the year the claim occurred;

5. (a) The number of claims closed with payment to the claimant during the calendar year next preceding, to be reported by the year the claim occurred;

(b) The total monetary amount paid thereon, reported by the year the claim occurred, and

(c) The total allocated loss expense paid therein, reported by the year the claim occurred;

6. The monetary amount paid on claims during the calendar year next preceding, to be reported separately by the year the claim occurred, with allocated loss expense paid to be reported separately by the year the claim occurred;

7. The number of claims closed without payment to the claimant during the calendar year next preceding, by the year the claim occurred, and the allocated loss expense paid thereon separately by the year the claim occurred;

8. The monetary amount reserved in the annual statement for the calendar year next preceding on claims incurred but not reported to the insurer;

9. The number of lawsuits filed against the insureds during the calendar year next preceding, to be separately reported by the year the claim occurred;

10. A distribution by size of payment from those claims closed during the calendar year next preceding, showing the number of claims and total amount paid for each monetary category as determined by the Commissioner.

A check with the Commissioner's office reveals that these reports are on file as of July 1 of each year. However, they are merely available for perusal in the office and not for copying (except at a cost of $1.00 per page). There are approximately 1,000 insurers of public entities.

These reporting requirements do not apply to self-insured entities.

The most significant impact of a reporting system is notice to the entities of the kinds of dangers resulting in harm

and thus hopefully inducing the entities to remove these dangers. Under the present reporting system, there is no indication of the kind of dangers. Therefore, it is recommended by the staff of the Joint Committee that paragraph number 11 be added to Section 6663, as follows:

> (11) The kind of loss occurring--workers' compensation, automobile liability, and a general liability, personal injury, or property damage. The frequency of loss in each of these categories should be reported.

It is also staff's opinion that this section be extended to include self-insured entities. In this way the reporting system should more adequately serve the significant preventative function.

III

SUBSTANTIVE RULES OF LIABILITY AND IMMUNITY

A. Discretionary Immunity.

1. Existing Law. Government Code Section 820.2 provides that a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.

As explained in Litman v. Brisbane Elementary School District, (1961) 55 Cal.2d 224, the purposes of such immunity are to prevent officials from having their decisions subjected to the second-guessing of a jury and to avoid diminishing their zeal in the performance of their functions. Discretionary immunity is not a favored concept in that courts generally dislike immunity and favor liability. To determine what are discretionary versus ministerial, the courts often make ad hoc decisions which are

disadvantageous to the governmental entity.[5] For example, the police decision to stop a car is discretionary. However, the policeman's conduct in making the stop is ministerial. Such distinctions are more subtle than obvious.

The staff of the Joint Committee believes it would be difficult to legislatively categorize all of the situations in which an act could be discretionary rather than ministerial. It is staff's recommendation that the Legislature show its intent concerning Government Code Section 820.2 by including within the comments to that section that the burden of proof should be placed upon the plaintiff to show that the government entity was not immune if discretionary immunity is raised as a defense.

B. Design Immunity. Government Code Section 830.6 provides that:

> "Neither a public entity nor a public employee is liable . . . for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved . . ."

This is the administrative law test, i.e., if there is a rational basis for the design, and there is authority to adopt such design, there shall be no liability. Subsequent to the enactment of this section, case law carved out several exceptions. In Baldwin v.

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[5] See, Advisory Committee on Government Liability "Minutes of Meeting" (Dec. 6, 1978) (on file in Committee office).

State of California, (1972) 6 Cal.3d 424, the Court held that the design immunity does not remain intact where changed circumstances clearly reveal the defects of the plan. The basis for the holding was the legislative intent as found in the Law Revision Commission Report and the purpose of the design immunity. The Court felt design immunity was support to discretionary immunity. Thus, the immunity should be considered to have terminated when the Court finds: 1) the plan or design if effectuated has actually resulted in a dangerous condition at the time of injury; 2) prior injuries have occurred that demonstrated that fact, and 3) the public entity has knowledge of these prior injuries and a reasonable time to protect against the dangerous condition. The second exception to the immunity came in Cameron v. State of California, (1972) 7 Cal. 3d 318, which held that a public entity may be liable for failure to provide warning signs if such were necessary to warn of a dangerous condition not reasonably apparent nor anticipated by a person using the highway with due care. Liability was found even though design immunity may have been applicable, since the failure to warn was an independent basis for recovery.

It is the recommendation of the staff of the Joint Committee that Government Code Section 830.6 be reenacted, affirming the legislative intent to provide immunity for design. A statement in the legislation should provide that its purpose is to reenact Section 830.6, obviating the holding in Cameron.

A governmental entity does not always have the foresight to know when a plan becomes outdated. Even upon later knowledge

of the dangerous condition, the government entity may not have the resources to redesign and reconstruct the condition. Furthermore, there may be cases, such as the Golden Gate Bridge, where the entity knows of a dangerous condition and an entity knows and may have the money to change the design, but it is not feasible to correct.

C. Dangerous Conditions of Public Property. An entity may be liable for dangerous conditions of public property or adjacent property which create a substantial risk of injury, when the property is used with due care and in a foreseeable manner, if the condition proximately caused the injury and created a reasonably foreseeable risk of harm (Government Code Sections 830 and 835).

It is generally felt that liability for dangerous conditions is an important deterrent function to make public property safe. However, much of the concern with the liability in this area stems from the problem of constructive notice, i.e., notice which imputes to the entity based upon a showing of circumstantial facts. Government Code Section 835.2(b) provides a public entity has constructive notice of a dangerous condition if plaintiff establishes the condition was obvious and existed for a period of time.

Staff recommends that constructive notice be eliminated as a basis for liability under the dangerous condition of public property liability.

In addition to the practical problem and cost of inspection, there are many circumstances where a government entity has no way to know of the condition. A court or jury may find liability out

In addition to the practical problem and the cost of inspection, there are many circumstances where a government entity has no way to know of the condition. A court or jury may find liability out of sympathy for the plaintiff's damages. When there is such an inspection, an anomalous result may occur. For entities having an inspection procedure, the jury may find that they should have known within the meaning of section 835.2(b). Where there is no inspection program, however, the jury may find that they reasonably would not have known and thus there would be no liability. Thus, Government Code Section 835.2 should provide a further immunity that where an entity adopts a system for inspecting public property that no liability should stem therefrom.

D. Emergency Vehicle Liability. Vehicle Code Section 17001 provides that a public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment.

As a result, when vehicles in emergency situations cause death or injury to personal property, there is liability except within a limited set of circumstances where they are responding to a fire.

Section 17004 provides an immunity for all vehicles responding to an emergency call, but case law has eviscerated much of this section.

Since the emergency services provided by public entities are provided by them exclusively and not as a proprietary function, staff recommends the immunity be reaffirmed and reenacted.

E. Nuisance Liability. Civil Code Section 3479 defines a nuisance as anything which is injurious to health or is indecent or offensive or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property or unlawfully obstructing the free passage or use in the customary manner of any navigable lake or river, bay, stream, canal or basin or any public park, square, street or highway.

In Phillips v. Pasadena, (1945) 27 Cal.2d 104, and in Granone v. Los Angeles County, (1965) 231 Cal. App. 2d 629, it was held that a municipality may be held liable for creating and maintaining a nuisance notwithstanding the fact that governmental activity is involved. Thus, both before and after the enactment of the Government Tort Claims Act, public entities have been liable for creating a nuisance. This was not a problem until Nestle v. City of Santa Monica, (1973) 6 Cal.3d 920, which involved injuries alleged to have been suffered by the plaintiffs by virtue of defendant's operation of an airport near plaintiffs' property. The problem was not so much that there was liability for nuisance, but it seemed the opinion held that even though there was immunity for a design or plan, there could still be liability on the basis of another statutory section. It would appear that where there are overlapping liabilities and immunities, liability prevails.

Therefore, it is staff's recommendation that nuisance liability be retained, but that where there are overlapping theories of liability and immunity, a dominant purpose test be applied. In other words, after analyzing the facts and the theories of immunity and liability, the theory that predominates should prevail.

F. Inspection. Government Code Section 818.6 provides that a public entity is not liable for injury caused by its failure to make an inspection or by reason of making an inadequate or negligent inspection of any property other than its property for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety.

As indicated, while there is no liability for inspection, it may be a basis for imputing constructive notice. Staff recommends that Section 818.6 be amended to provide that making or failing to make an inspection should not be a basis for constructive notice and that constructive notice no longer be a basis for liability.

G. Misrepresentation. Government Code Section 818.8 provides that a public entity is not liable for an injury caused by misrepresentation by an employee of the public entity whether or not such misrepresentation be negligent or intentional.

In Johnson v. State, (1968) 69 Cal.2d 782, the Supreme Court held that the Legislature intended to exempt the entity from liability arising out of misrepresentation by a public employee. In Connelly v. State, (1970) 3 Cal. App. 3d 744, the Court of Appeal took the Johnson decision one step further in finding that a public entity might be liable for a negligent forecase of river height. The Court held that the claim for commercial loss suffered by the owner of three marinas located near the confluence of two rivers and based on the State's negligence in disseminating inaccurate

river height forecasts did not come within the immunity provided by Section 818.8.

According to the legislative committee comment, the misrepresentation immunity was that public entities should be provided with an absolute immunity from liability for negligent or intentional misrepresentation with no limitation that it be required to be in financial matters versus other areas.

It is the recommendation of the staff of the Joint Committee on Tort Liability that Section 818.8 be reenacted with the stated intent that the holdings in the Johnson and Connelly decisions are to be nullified.

IV

CLAIMS STATUTES

Under existing law, a plaintiff must file a claim with the public entity within 100 days from the date of injury. Failure to do so may bar the claim unless plaintiff can show due diligence and no prejudice to the public entity. The denial of a claim must come within 45 days from the filing of the claim and if no formal denial, it is deemed denied. Denial is a condition precedent to filing suit (see, Government Code Sections 905, 910, 911.6, 915 and 945.6).

It is staff's recommendation that the Claims Statute be retained, but that it be modified as described above. Furthermore, staff recommends that the benefit of the Claims Statute and risk management be implemented as discussed above.

V

EARTHQUAKE HAZARDS AND LIABILITIES

Although the staff would prefer to avoid immunities directed at very specific areas and instead deal with principles applicable to a variety of situations, recent concern with earthquakes, their forecase and government's role require some consideration.

A recent meeting of public entity representatives revealed great uncertainty and concern over potential liability in moderate earthquake circumstances. Entities desire to undertake preventive measures, but are fearful that such undertaking may increase potential liability. Therefore, they hesitate to act. Representatives generally agreed that liability for a catastrophic occurrence was not the issue. The moderate earthquake which may cause isolated deaths or injuries is the matter of concern. Substandard buildings may collapse in a moderate quake which poses little or no threat to buildings constructed in recent years. A legitimate object is to attempt to upgrade such deficient structures. The following recommendations seek to achieve: 1) reduction in the uncertainty about potential liability as the result of certain actions; 2) elimination of the safety disincentives in the current system, and 3) reduction of earthquake hazards without increasing local government liability.

A. Dangerous Conditions of Public Property. In order to promote reduction of earthquake hazards, staff recommends the legislative establishment of a program wherein:

1. The State, through the state geologist, within a specified period determine areas of significant seismic risk in

the state;

2. Upon determination of the seismic risk areas, the state geologist shall notify all entities wholly or partially located within seismic risk areas that they are so located;

3. Local government wholly or partially within seismic risk areas would be immune from liability at the time of notice and would retain immunity upon satisfaction of the following conditions:

a. Within a period of time commensurate with the size of the entity, inspect all publicly owned properties to ascertain if such property constitutes a potential hazard to life or other property in the event of a moderate earthquake;

b. Within one year of completion of the inspection described above, adopt a plan and establish a time period for mitigation of the hazards discovered;

c. Reasonably comply with the inspection, plan formulation and plan execution.

If liability should be found against a public entity for damages arising from adjacent private property, such liability would be limited to the percent of fault of the public entity.

B. Dangerous Conditions of Private Property. In order to encourage voluntary rehabilitation of those buildings constructed prior to practical earthquake standards, local entities should be authorized to adopt structural earthquake life-safety standards less rigorous than applicable building code. The object of the legislation is to promote life safety rather than minimize property

damage. The local entity would be immune from liability for any damage of any kind allegedly caused by the adoption and/or enforcement of such legislation. This legislation is to assure that 'notice' does not create liability.

Actual or constructive notice of a dangerous condition of private property cannot be a basis of liability for any damage caused by an earthquake unless:

1. The entity failed to comply with a mandatory duty, assuming all other elements of a cause of action are satisfied; or

2. The loss occurred on public property because of the defective condition of adjacent private property; and

3. The public entity had actual notice of the defect and sufficient time and resources to abate the hazard. Notice alone does not create liability. All other elements of a cause of action must be satisfied.

If liability should be found against an entity, such liability would be limited to the percent of the public entity's fault or responsibility.

C. Immunity for Earthquake Prediction or Warning. Legislation should be adopted immunizing any public entity, having a significant population and acceptable seismic activity prediction capacity, from any liability which might arise as a result of any earthquake warning or prediction; acts or omissions in inspection or fact gathering; evaluation or any other activity done for the purpose of predicting or warning.

The entity would be immunized from liability for prediction or warning in the same manner as provided in Government Code

Sections 8550, et. seq., and Civil Code Section 1714.5.

D. Other. Staff recommends that the Attorney General be requested to render opinions on 1) whether a local government's enactments can impose a mandatory duty upon such entity or other entity's within its jurisdiction, and 2) whether information received concerning hazards constitutes changed conditions within the holding of Baldwin v. State of California, (1972) 6 C.3d 424.

EXHIBIT A

GOVERNMENT LIABILITY ADVISORY COMMITTEE

The Advisory Committee on Government Liability held its last meeting in Los Angeles on December 6, 1978.

I

ATTENDANCE

In attendance at the meeting were:

Robert G. Walters
County of San Diego

Roy Pederson
City of Montebello

Gordon Baca
State Dept. of Transportation

Jerry Roberts
County of Fresno

Ben C. Francis
Public Agency Risk Managers Assn.

Lloyd C. Fowler
Santa Clara Valley Water District

William L. Berry, Jr.
County Supervisors Assn. of Calif.

Robert C. Lynch
L. A. County Counsel Office

Robert K. Booth, Jr.
League of California Cities

Robert S. Thompson, Assoc. Justice
Court of Appeal

William C. George, Counsel
Joint Committee on Tort Liability

Marie Gibson Myll
Citizen, Long Beach

Michael M. Berger
Radems, Berger & Norton

Richard Pucci
City of Temple City

Gordon R. Lindeen
Rancho Simi Recreation and Park District

II

OPENING COMMENTS

Justice Robert S. Thompson, Committee Chairman, opened the meeting with a general statement of the purpose of the meeting to include all relevant topics and exclude the irrelevant ones. For this purpose, an outline for discussion was presented. The agenda of the meeting followed this outline. Justice Thompson then asked

if any topics were omitted from the heading of Broad Categories in the Outline. Bob Walters from the County of San Diego responded that Proposition 13 should be included, to which response there was no disagreement.

III

CATEGORIES OF ISSUES

A. Philosophical Bases of Government Liability and Immunity. Justice Thompson opened this issue for discussion with the following remarks: The philosophical bases of government liability and immunity are a necessary topic of consideration in order to understand the legislative scheme underlying existing law. This scheme balances two conflicting policies: 1) the protection of the governmental funding and decision-making process, and 2) the compensation and deterrence of injury-causing conduct. Justice Thompson pointed out that historically the policy of protecting government was first in time.

The discussion of the issue ensued with comments as follows: LYNCH: Prior to the enactment in 1963 of the Government Tort Claims Act, the Legislature debated whether the scheme should be open or close-ended. An open-end scheme is one in which the government is to be held liable like a private citizen with immunities provided in only special areas. A close-end scheme makes government entities immune from suit in absence of statutory authority creating liability. Mr. Lynch believes the 1963 scheme adopted the open-end approach and thus government is liable like an individual. He commented that the fact government is different than a private citizen should be pointed out.

BACA: Mr. Baca disagrees with the purpose of liability as a deterrent. He uses the Ford Pinto case as an example. He feels, further, that the compensatory aspect of liability is speculative and mentioned the alternative of a government fund from which injured victims could recover.

THOMPSON: Responding to Mr. Baca's comments, Justice Thompson pointed out the problems which arise when a non-government tort-feasor is involved.

MYLL: Concerning the discussion of the philosophical bases of tort law, Mrs. Myll felt the following quote from John Sturat Mills was appropriate:

> "Not the violent conflicts between parts of the truth, but the quiet suppression of half of it is the formidable end; there is always hope when people are forced to listen to both sides: it is when they tend only to one that error hardens into prejudice and truth itself ceases to have the effect of truth by being exaggerated into falsehood."

A discussion of the government orientation of the Advisory Committee ensued. Some members felt this was planned. However, it was pointed out that any weighting of the Committee in favor of government was unintentional.

BERRY: Mr. Berry was confused as to the purpose of the Advisory Committee.

GEORGE: Committee Counsel, Bill George, explained that the purpose of the Advisory Committee was to obtain practical alternatives to resolve problem areas in government liability. He explained that since each member has his own representation with a disparate interest that no consensus should be reached. On the government

side, the impact of Proposition 13 on the ability of government to respond to damages should be considered. On the victim's side, the need for compensation for his injuries should be considered. Upon review of the considerations made by the Advisory Committee, the Joint Committee on Tort Liability will be more in a position to recommend how a balance between competing considerations can be struck.

B. Risk Management.

1. Defined: The following definition of risk management was agreed upon by the members:

> "The logical and deliberate analysis of exposure to risk in order to identify those risks of operations, and to apply the following disciplines to eliminate, reduce and manage those risks: 1) risk avoidance; 2) risk transfer; 3) loss prevention; 4) loss management, and 5) risk funding.

The discussion of risk management included the following comments:

ROBERTS: In his job, the definition of risk management encompasses not only loss prevention, but also includes claims management. Roberts agrees that the above definition is a good classical and practical one. He also commented that such practice is also called "safety prevention" and that this latter term is not as comprehensive as risk management programs.

FRANCIS: Is funding part of risk management?

ROBERTS & FRANCIS: Both gentlemen would include in risk management financing of the loss.

PEDERSON: Mr. Pederson is against state control of risk management programs. He believes an immunity for negligent operation of a risk management program would be desirable.

THOMPSON: Asked if rather than a state-mandated program for risk management if a procedural benefit to agencies having such programs would be satisfactory.

LINDEEN: At a meeting with an insurer, Mr. Lindeen discovered that the insurer was against the use of a risk manager, at least in name, since having inspections is another basis for liability which can cause an increase in premium rates.

PEDERSON: Mr. Pederson's insurer encourages risk management.

BOOTH: A risk manager is a prerequisite to obtaining insurance with his insurer.

THOMPSON: The problem under existing law is that those not having inspectors will not be charged with constructive notice, whereas those that do can be held for negligence in not preventing the injury (See, Morris v. County of Marin; Elson v. P.U.C.).

BERRY: If the inducement to implementation of a risk management program is in the form of a procedural benefit, does this mean the state will set the standards for risk management?

THOMPSON: Yes, but these can be borrowed from standards already in use, perhaps from P.A.R.M.A. (Public Agency Risk Managers Association).

WALTERS: The cities would prefer this approach.

THOMPSON: Is there an issue of illegal delegation there?

BERGER: Mr. Berger commented that if the purpose of risk management is loss prevention, then risk management should be its own benefit. He would disagree with giving additional benefits.

THOMPSON: Justice Thompson suggested the following benefits: use of the California Claims Statute for late claims for those entities having risk management and the New York Claims Statute for those not having risk management. He feels such legislation would withstand equal protection challenge on a rational basis test since a claims statute is directly related to risk management.

WALTERS: With regard to a state program, Bob Walters felt it was feasible but probably would be more bureaucratic.

2. Impact of Proposition 13 on Risk Management. There has been a reluctance to spend money to hire new people now in order to save money down the line.

PEDERSON: Mr. Pederson said that if entities are given state aid for risk management, that may be an inducement.

WALTERS: Every dollar you invest would save $8.00. But still he could not sell the program to San Diego county.

BERRY: He said that smaller, rural counties might not be able to afford this; they might have to share. In setting standards, the financial ability of the entity may have to be considered.

PUCCI: He has had a professional risk manager for 30 cities and it has worked out fairly simply.

THOMPSON: Under the JUA pooling, problems are now solved.

3. Statutory Reporting Requirements.

BOOTH: He feels they are onerous and costly. They should have an SB 90 reimbursement.

THOMPSON: There is a tendency to require more in reporting than is worthwhile. One of the problems of loss prevention management is for a category of losses to become known in general.

PEDERSON: Mr. Pederson anticipates compilation by P.A.R.M.A.

WALTERS: In the areas of workers' compensation, automobile liability, general liability, personal injury and security, there are requirements of reporting for the City of San Diego.

THOMPSON: Can this be standardized? Could this be part of the reporting requirements?

WALTERS: Yes, yes.

BOOTH: Another model could be that used by R. L. Couts.

THOMPSON: To serve the purposes of risk management, while preserving confidentiality, all we need to know is the class frequency, i.e., identification of the cause of injury and the number of accidents in that group.

LINDEEN: Clerical expense could be reduced by use of a simplified form, especially in view of Proposition 13.

(Recommendation: Give to P.A.R.M.A. to come up with a plan and estimate of cost.)

WALTERS: On state reporting, Mr. Walters believes that is the first step to state control.

THOMPSON: Could P.A.R.M.A. standards for risk management require extra communication regarding loss frequency between entities' risk managers?

WALTERS: This is being done by telephone now.

MYLL: That's haphazard.

PEDERSON: Should publicity be a part of risk management programs when the entity is so small that statistics won't preserve confidentiality?

BACA: Gave an example of when publicity could prevent further injury and loss: bicycles with thin tires in drainage grates. Cal-Trans is disseminating this information, but is unsure if county/city entities got the word. There is a need for dissemination of loss frequency at modest cost.

WALTERS: The League of Cities articles are helpful. Another advantage of risk management statistics is proof to insurers that risk is less than they say, so premiums should be less.

THOMPSON: Summarising reporting requirements problems: 1) avoidance of superfluous reporting and onerous expense; 2) should not interfere with confidentiality of entity; 3) should serve purpose of disseminating information.

BERRY: He commented that there were two kinds of reporting: 1) accident frequency and class: proper subject of reporting through P.A.R.M.A., and 2) claims losses: the value of this kind of reporting is for insurance. This is a regulatory kind of reporting. It should come under the wing of the insurance commissioner.

THOMPSON: In government liability, one specific area which is important as to the control on premiums is the loss experience of the self-insured. He uses this as a basis for showing the management deficiency of mutual companies. And he wondered whether reporting by self-insurers is cost-effective and, if so, should others benefit therefrom.

A suggested further work-up is to prepare standards for risk management, reporting and cost-effectiveness.

C. Substantive Rules of Liability and Immunity. Justice Thompson introduced this area by outlining the major areas of liability under the 1963 Tort Claims Act. He stated that the large general group which gave rise to government liability was for employees' torts.

1. Discretionary Immunity: Justice Thompson stated that government is not liable for discretionary acts of its employees. Discretionary means policy matters. Case law reaching the appellate courts in this area concern mainly the definition of a policy versus a ministerial matter. For example, a policeman's decision to stop is a policy decision, but if he does stop, the conduct in stopping is ministerial. One issue under this heading is whether or not a legislative definition of "discretionary" versus "ministerial" is necessary or desirable.

Comments:

WALTERS: He is satisfied with the status quo with the exception of a few aberrant decisions.

PUCCI: He is in accord with Walters. He feels it would be difficult to draft legislation defining discretionary versus ministerial.

BOOTH: He doesn't feel discretionary immunity is a useful immunity any more. The courts have vitiated this immunity.

LYNCH: There is a problem under existing law with law enforcement officers. There should be more immunity in emergency situations. This is a high-risk area for which government is mandated to provide service and there should be immunity.

BOOTH: In the outline for discussion under "Discretionary Immunity" Mr. Booth is against numbers 2 and 4; he feels that the proprietary versus governmental distinction is worse than what we have now, but would be for an immunity for carrying out inherently dangerous services in hot pursuit.

WALTERS: From a risk-management standpoint, San Diego is trying to get away from hot pursuit situations. Both Mr. Lynch and Mr. Booth disagree.

BOOTH: He feels there is a discrepancy with the existing law between the immunity afforded fire departments and lack of immunity for acts of police officers.

GEORGE: Mr. George pointed out that the availability charges may expand liability for failure to provide water to fight fires.

BOOTH: Is immunity needed to cover that?

2. Design Immunity: Justice Thompson began the discussion of this area by stating that the Code provides government immunity for damage for injury due to defective design if 1) approved by specified level of government, and 2) if there was a rational basis for the executive decision. He states that, basically, this is the administrative law test. If it is met, the judiciary won't review the decision. The initial litigation in this area dealt with the presence or absence of rational basis. Litigation since then has dealt with the continuity of immunity once it attached; that is, changed conditions. Where there are changed conditions, the immunity is vitiated. The failure to warn of defect is also a basis to abrogate the immunity. The first issue discussed under the subheading is what are the options and problems.

Comments:

LYNCH: Mr. Lynch feels the use of constructive notice is unfair. There should be actual notice before immunity is abrogated. Also, there are some conditions which, if they become unsafe, still cannot be corrected. He gave the example of the Golden Gate Bridge and wondered that if it were determined that the bridge subsequently became unsafe, what could be done about that, and should liability therefore attach because of changed conditions.

WALTERS: He feels the case of Baldwin does a public service by requiring the entity to be responsive to public dangers.

BERRY: He feels if carried to a logical conclusion and in view of Prop. 13, the Baldwin decision imposes too great of a burden upon a public agency to inspect and reconstruct. There must be a reasonable limitation.

PUCCI: The administrative law test is too great a burden for the plaintiff to meet. It would be more honest to say let's just give the government an absolute immunity.

The consensus seems to be that Baldwin, Li and AMA are a problem for public entities taken as a whole.

LYNCH: He feels constructive notice is a problem. For example, a branch fell off a tree and made a paraplegic of a little girl. There was a rotting on the tree, but only on the inside. The burden to inspect the inside to every tree is just too onerous to place on a public entity.

LINDEEN: Prop. 13 makes this a dramatic issue, especially for entities which didn't get any bail out money.

THOMPSON: He wonders if it is an appropriate inquiry if, because of Prop. 13, certain government services will be cut off.

BOOTH: Mr. Booth suggests a limitation on changed conditions by the assertion of an absolute bar if plaintiff is at fault in misusing the public property. Also, he believes they should expand private design--for example, approval through building codes for design of private builder (this is really discretionary and also involves an inverse condemnation situation).

3. Nuisance Liability: Justice Thompson asked, is it a problem? Nuisance liability is defined as a catch-all tort. There is a Civil Code definition existing. Justice Thompson stated that generally nuisance liability is misuse of public property to the harm of a third person. The leading case in the area is the case of Nestle. This is an airport noise case in Santa Monica. It is a good inverse condemnation case. He asked whether or not nuisance covers personal injury, whereas inverse condemnation covers property? It is the understanding of Justice Thompson that there is a new appellate court case on whether assumption of the risk can be applied by moving to a nuisance.

PEDERSON: He feels the problem of stray golf balls to an abutting land owner built subsequent to the golf course should be covered by assumption of the risk.

LYNCH: To the extent that liability for nuisance is allowed, the logical result is to limit or close down the service creating the nuisance. In view of Prop. 13, Lynch feels this is more and more likely.

The consensus of the group was that nuisance liability is not too great a problem.

LINDEEN: As to governmental versus proprietary, Prop. 13 may cause many entities to become more and more proprietary in order to finance services. He thinks that makes this alternative less attractive.

4. Emergency Immunity: Emergency immunity is particularly important with vehicular activity. However, it would also include misuse of firearms. The test could be, "was the emergency such as to justify the action?"

BOOTH: With the Pasadena case, the felony-pursuit case, emergency liability may be a problem.

LYNCH: He felt the Pasadena case was a misdemeanor and not a felony case. He points out this is a problem with police cases. If an officer is grossly negligent, liability may be conceded. But, government should not be liable for harm caused by the criminal.

THOMPSON: This is a problem under existing law. Justice Thompson points out if you are a traditionalist when it comes to the theory of proximate cuase, criminal conduct is a supervening cause only if it is unforeseeable.

BOOTH: Perhaps an injured third party should be considered as the victim of a crime. There are presently statutes which provide recovery for victims of crimes. Both Mr. Booth and Berger are concerned that the "Harley Cowboys" (over zealous police officers) should be kept under control.

BOOTH: He is against the concept of gross negligence being thrown back into the law. He feels this concept is no longer extant.

5. Dangerous Conditions of Public Property: Justice Thompson explained that dangerous conditions of public property is the basis for liability when it is being used properly and the danger is not apparent to the user and the entity has actual or constructive notice.

WALTERS: He gave the example of San Diego where there are 57 miles of cliffs. Some of these cliffs are on county property and they are inherently dangerous and it is a recognized fact. Since it is a natural condition, San Diego will not touch the cliffs to make them safer because if they do, they will abrogate the immunity.

BOOTH: He notes the problem of growth of vegetation. He feels this is an unfair burden to be cast on the public entity. The second area of liability is for lack of lighting--public parking lots are an example. It is also an example of criminal acts. The Santa Barbara case held no liability, but there is an L.A. airport case going contra.

THOMPSON: Justice Thompson summarized the discussion of the problem as one involving government responsibility and the limitation on government by Prop. 13.

BOOTH: He said to look to the notice provision in the dangerous condition of public property. By requiring actual notice, it would eliminate many problems. It would eliminate constructive notice and as a trade-off, there could be the requirement of periodic inspections. The issue would then boil down to one of adequacy of inspection.

A discussion regarding a no-fault system ensued.

BOOTH: The Morris case is in its infancy now. The mandatory duty cases may generate many cases and perhaps an immunity in this area would be appropriate.

6. Overlapping Causes of Action:

THOMPSON: One of the problems of the Morris case was the implication that specific immunity always yields where there is another basis for liability. He believes another test could be the dominant purpose which would put the case law back to where it was.

7. Miscellaneous:

LYNCH: Concerning forecasting, he feels one of the miscellaneous problems is the Sacramento River case which is illustrative of the misrepresentation-forecasting problem. There is an immunity for misrepresentation, but none for negligent forecasting.

BOOTH: He recommends perhaps a waiver of liability for services provided.

LYNCH: He cites the Law Revision Commission report for the purpose of a misrepresentation immunity. The purpose was that they did not want to create ostensible authority on an employee's part to bind the government.

D. Procedure.

1. Claims Statute:

BOOTH: An alternative not mentioned in the outline is to eliminate the claims statute. The late claim defense has virtually been wiped out by the recent Kern County case. If you admit that the purpose of the claim statute is to settle without the need for litigation,

it would serve a meritorious purpose. However, most entities deny claims perfunctorily. He recommends that as part of the claims statute, contact with the claimant be required.

WALTERS: He does not feel that 45 days is sufficient time to satisfy discovery in a serious case. Thus, many claims are denied on that basis. The purpose of the claims statute is the effort to make the whole procedure timely. He thinks the statute of limitations should go to one year from the date of loss, rather than nine months.

LYNCH: The difference in the 100-day statute is the ability to obtain discovery in a timely manner. This is seen in federal cases.

BOOTH: He suggested the penalty for perfunctorily rejecting claims would be a bad faith administration case analogous to the bad faith insurance case.

PUCCI: He does not feel 45 days is enough time to relay to the adjuster, get back and settle the claim.

THOMPSON: If the entity does not act within 45 days, suit can be brought. A rejection of the claim is superfluous and an additional administrative hassle lengthening the statute. Why not have the statute of limitations for one year from date of loss? Usually the 100-day period can be waived. His recommendation is thus to eliminate rejection as part of the claims statute, the penalty merely being that suit is then permissible. The test for barring suit due to a failure to file a timely claim is one of prejudice, the burden being on the entity to show that it wasn't prejudiced.

BOOTH: One argument against claims statutes is that shorter claims statutes causes a plaintiff's attorney to avoid malpractice by suing the entity prior to the opportunity of discovery disclosing entity's liability. Thus there is potential for needlessly claiming against the entity.

BACA: He would rather have a claims statute come in with a few cases that are specious because of the opportunity to investigate. He believes an entity would most often lose on a test of prejudice with the impact that the entity would have to defend the suit. The dislocation of the entity would be the fact of no notice until eight to ten months later, with the ensuing loss of evidence and danger that the injury-causing conduct will continue to exist.

ROBERTS: He believes that plaintiff's bar would use prejudice to their advantage, not to file until the last moment to prevent an entity as a tactical matter from collecting data.

WALTERS: Five percent of all claims go to litigation. One-fifth of the cases are settled. Other claims are not pursued.

ROBERTS: Claims denials are rather routine because of strategy. Even if the entity believes the case is worth the amount claimed, for tactical considerations, the claim is rejected.

BACA: The duty of cooperation under an entity's insurance policy may be another reason why entities deny claims perfunctorily. He would rather see an open-ended period for rejection of the claim. Forty-five days is inadequate to gather information and to evaluate it. They should allow a lawsuit after forty-five days, regardless of rejection. An alternative would be to extend the period for rejection to 100 days.

2. Statute of Limitations: The consensus on the statute of limitations was one year from the date of loss. The six months from the date of denial usually isn't a problem, according to Mr. Baca.

3. Bifurcation: The consensus was that bifurcation is not needed, nor desired.

ROBERTS: He believes sympathy makes bad case law and doesn't understand the reason for not bifurcating.

BOOTH: He believes bifurcation is too expensive, too time-consuming and is a good defense tactic because he has nothing to lose. It costs plaintiff lots of money.

LYNCH: He doesn't believe there is any problem getting bifurcation if it is desired under existing law.

ROBERTS, BOOTH, THOMPSON: They are contra to the last comment by Mr. Lynch. They believe that only in cases where there are special defenses is bifurcation permitted.

BACA: He does not believe bifurcation solves the problem. This is because plaintiff will sit through the trial in his wheelchair.

4. Cost-shifting: Justice Thompson defined cost-shifting as a British concept of assessing the costs of trial. The loser pays witness fees, expert fees and counsel fees according to the discretion of the court. The options under this device would be 1) to retain the current rule, each party bearing their own expense; 2) adopt the British rule; 3) use the model of AB 1XX enacted in Civil Code 1362; 4) expense-shifting--parties brought into the suit if additional party prevails--this is the Calabresi concept of transactional costs theory due to AMA. One of the concerns is

that government is the deep pocket. The way to avoid additional parties being brought into the suit would be that plaintiff gets one free defendant. Every defendant thereafter is entitled to cost-shifting unless liability is found. A defendant under AMA assumes the same risk. The policy is to decrease multiple party litigation especially now if the Supreme Court reverses the appellate decision in Jess v. Hermann. A question was posited as to the Calabresi method whether the costs are imposed against the party or the attorney. Justice Thompson responded that it would be against the party.

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78-287

OUTLINE FOR DISCUSSION AT

December 6, 1978 MEETING

OF GOVERNMENT LIABILITY ADVISORY COMMITTEE

I. Purpose of Meeting -- As at the first meeting, no effort will be made to reach consensus or to record votes on positions on the items discussed. The purpose is to illuminate the options available to the Legislature in dealing with perceived problems in the various areas of government tort liability. Those will be reported with the request that the Joint Committee inform the Advisory Committee of those options which should be eliminated and those which should be explored further.

II. Broad Categories of Issues:

A. Definition of the philosophical basis for Governmental liability or immunity.

B. Risk Management.

C. Substantive rules of liability and immunity.

D. Procedural rules.

E. Damages.

F. Multiple parties.

G. Funding.

III. Philosophical Basis:

A. Protection of governmental funding and budgeting and governmental decision making.

B. Deterrence of injury causing conduct and compensation to the injured.

IV. Risk Management:

A. Definition.

B. Determination and administration of standards for risk management plans.

C. Risk management at the state level:

1. Adequacy of current risk management programs.

2. Need, if any, to examine those programs for adequacy and possibility of improvement.

D. Risk management at local level:

1. Adequacy of current risk management programs.

2. Encouragement to local entities to adopt effective risk management practices:

a. By means of amendment of the presentation of claims statute to give greater protection to entities with adequate risk management plans than to those without?

b. By specific substantive law protection (for example, some limitation on some types of liability to entities with effective risk management)?

c. By statutory reporting requirements:

i. Are current requirements for reporting of claim potentials against governmental entities adequate?

ii. Requiring only insurance companies to report?

iii. Requiring reports by insurance companies to be sent or disseminated to public entities?

iv. Making reports available to the public?

v. Requiring self-insurers to report also?

IV. Substantive Rules of Liability and Immunity:

A. Discretionary Immunity:

1. Is statutory clarification necessary or desirable?

2. Should the administrative review test (abuse of discretion for lack of a rational basis for the action) be adopted?

3. Should a codification of areas where discretionary immunity applies be substituted for the current case law categories of "policy" decisions (immune) and "ministerial" decisions (not immune)?

4. Should the former "governmental" vs. "proprietary" dichotomy be revived with a specific statutory definition of "governmental functions" to which discretionary immunity is applicable?

B. Design Immunity:

1. Should the present form of design immunity be retained without change?

2. Should liability for changed conditions be subjected to the same test as original design immunity -- i.e., no liability unless it is first determined as a matter of law that there is not a rational basis for failing to accommodate the original design to changed conditions?

3. Should there be a return to the "governmental-proprietary" dichotomy with respect to design immunity?

4. Should the scope of design immunity be expanded?

C. Nuisance Liability:

1. Should governmental liability for "nuisance" be retained per Nestle v. City of Santa Monica?
2. Should it be eliminated?
3. Should the "governmental-proprietary" dichotomy be applied?

D. Emergency/Emergency Vehicle Liability:

1. Retain rules of current case law?
2. Absolute immunity?
3. Liability only for gross negligence?

E. Liability for Dangerous Condition of Public Property:

1. Is the current distinction between liability for natural and artificial conditions adequate?
2. Should "minor" modifications in property be treated as not changing the "natural" condition? If so, what is the definition of "minor"?

F. Overlapping Causes of Action -- where immunity applies to one or more theories of liability but not to all:

1. Retention of current case law - no immunity if governmental conduct falls within a non-immune theory?
2. Absolute immunity if conduct falls within an immune category?

3. Immunity determined by "dominant purpose" of the governmental activity?

4. Application of the "governmental-proprietary" dichotomy.

V. Procedure.

A. Claims Statutes:

1. Retain current law?

2. Shorten the 100-day period?

3. Lengthen the period? How long?

4. Change test of bar for failure to file a timely claim so that burden is on the entity to establish that it was prejudiced by the failure to file? Presumption of prejudice if failure to file a timely claim affects operation of a risk management program meeting established standards?

B. Statute of Limitations:

1. Retain current statute of limitations?

2. Shorten it? Extend it?

C. Bifurcation of Liability and Damage Phases of Trial:

1. Retain present rule bifurcation the exception?

2. Modify so that bifurcation is the rule and trial of damages and liability at the same time the exception?

D. Cost Shifting:

1. Retain present rule that winner bears his own expenses of litigation except for "costs"?

2. Adopt British system of shifting the winner's expenses of litigation to the losing party?

Note the historical difference between suits against governmental entities and ordinary lawsuits. At one time, a bond was required as a prelude to suits against the government.

3. Expense shifting if on pretrial motion the court determines that a party's probability of success is "X" and the party does not better "X" at trial?

VI. Damages.

A. Retain present rules?

B. Expand authority for periodic payments? Who is entitled to undisbursed sum upon the death of the recovering plaintiff?

C. Limit or deny recovery for pain and suffering? Combine with expense shifting?

VII. Joint Liability of Concurrent Tortfeasors:

A. Retain present rule of American Motorcycle Assn.?

B. Adopt several liability in general? Several liability only if plaintiff not also at fault?

C. Retain rule of joint liability and liberal joinder of parties at option of both plaintiff and named defendants but impose expense shifting against party who brings additional parties into the lawsuit if the additional party who is brought into it prevails? i.e., Plaintiff can sue one defendant without risk of expense shifting; if he sues multiple defendants, he runs the risk. Defendant who seeks "equitable indemnity" by bringing in cross-defendants runs risk of expense shifting.

VIII. Funding:

A. Are current provisions for funding adequate?

B. Is additional legislation for joint powers agreements needed?

C. Legislative authority for governmentally owned mutual or reciprocal insurance companies?

D. State owned public entity insurer? State fund?

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INSURANCE

INSURANCE

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THE INVESTMENT INCOME CONTROVERSY IN PROPERTY-CASUALTY INSURANCE

The insurance industry has long insisted that "financial considerations" are not usually used by insurers when setting rates. It has also been argued that the adequacy or excessiveness of rates should be judged solely on the underwriting profit or loss premiums generate. Traditionally, critics have decried the latter assertion, as it flies in the face of both common sense and economic theory (an unlikely pair). On the other hand, they have accepted on the industry's word that the former contention is true.

The place of insurer's investment income in rate-making first cropped up as an issue over 70 years ago. Since then, critics have charged that insurers and their regulators have acted as if a substantial portion of insurance profits did not exist. They have insisted that by including investment income in ratemaking insurers could and should lower rates. Insurers and most regulators (who are usually from the insurance industry) have both denied that investment income should affect rating and that it is large enough to have an effect on rates, in any case. Recently, many insurers have conceded the point and the issue has degenerated into irrelevant arguments over how investment income is to be considered in ratemaking, which share of such income "belongs" to policyholders, and which to insurers, and whether the issue applies to mutual insurers who receive part of all profits in the form of dividends. The insurers have benefitted from this argument since in most states nothing has been done.

By the standard industry explanation of ratemaking, the rate you pay is the sum of the amount of money the insurer expects to have to pay out in your behelf in claim payments, claim expenses and your share of general expenses, plus a provision for profit. The profit provision is key to the controversy since it is presented as being invariant. For instance, the provision designated for auto property damage liability and many other lines is five percent of the final premium. With auto bodily injury liability, it is one percent. These margins are often described as "purposely low" because there are additional profits from investment.

Critics, accepting the above as the way rates are actually set, have called this unfair. When an insurer receives a premium payment, it uses some of it to cover immediate expenses while investing the rest until it is needed to cover the expected claims of the insured. Since the insurer makes additional income from monies provided by policyholders, critics say this should in some way be reflected in lower rates.

Like any other business which takes in money in one period and gives it back the next, the insurance business makes most of its profits on the investment of that money in the intervening period, not on the difference between the original sum and the amount it gives back. Table I, in columns 2 through 5, lists the components of stock insurers' total profits from 1967 to 1976. (A stock insurance company is one technically owned by stockholders and run by its management; a mutual insurer is one technically owned by its policyholders and run by its management. Stock

insurers write about seventy percent (70%) of the business.) Comparing the companies' gain or loss on the difference between the premiums they took in and the claims and expenses they paid ("underwriting experience") and their gains or losses on the components of investment income, in the last three columns, shows that their profit position is affected far more by their investment results than by their straight insuring operations.

Clearly, as interest rates and stock market performances change, so will the return insurers can expect from investing the premiums they collect. In economic theory, the price of a good or service in a competitive market is the additional cost of production created by the last unit of the good or service produced, i.e., the "marginal cost" of that unit. This assumes that any additional units would cost more to the firm involved than they would bring into the firm in revenue. In the case of property-liability insurance, the marginal cost to an insurer of the last policy worth writing is the expected payouts on claims the policy is expected to incur, plus the expenses which are expected to arise in administrating those claims. However, since those claims are expected to occur sometime after the premium is collected, the true cost of those claims to the insurer is not their final cost, but rather the amount of money that would have to be set aside at prevailing interest rates that, with compound interest, would equal the final costs at the time they are expected to occur. This is the "present value" of the final costs.

The difference between the final costs and its present value is no mean affair: if for a given line of insurance, the time

between the receipt of the premium and the average loss on the policy, that is, the "tail" of that line, were one year, and if a six percent (6%) rate of interest were assumed, then the loss would be almost six percent greater than its present value.

Say that in this hypothetical line the claims on the last policy are expected to cost $100 at time of occurrence. The present value of $100 one year in the future at 6% interest is $94.34--the true marginal cost of the policy. However, suppose the next year everything stays the same except that the interest rate rises to seven percent (7%). The present value of $100 one year in the future at 7% interest is $93.46. Thus, marginal cost of the same policy has gone down as the interest rate went up. The rates of return on the investment of premiums is usually greater than those used here, as are the tails of many lines. It is clear that in economic theory competitive insurance rates would reflect prevailing rates of returns on investment and would change with them.

It should be noted here that profit motivated monopoly or imperfectly competitive insurers could be shown by similar analysis also to have their rates influenced by investment return. Rates and profits would be higher, of course, but the profit maximizing rate would still depend upon prevailing rates of returns on investment. However, since monopoly and imperfectly competitive firms are under loss pressure more than competitive firms to be profit motivated, the the extent that insurers behave as they claim to behave as regards investment return, they give evidence that they are not price competitive.

Perhaps, fortunately for the insurers, they and their critics are wrong: insurance rates do significantly reflect the investment income of the insurers. Historically, actual underwriting profit margins have almost never matched those claimed by the companies and the differences are related to investment possibilities. There are two simple demonstrations of this. First, the longer the "tail" of a given line of insurance, the greater time to invest the premium, the less underwriting profit, and the more underwriting loss. Underwriting experience appears to vary with measures of interest return, with losses going up and down with interest rates. As a simple example of this phenomenon, Table II lists loss ratios for all stock companies next to average rates for 90-day treasury bills for the years since 1950. (The loss ratio of an insurance company is the ratio of "losses and loss adjustment expenses," or claim payouts and the expenses directly associated with them, to premiums earned for the year in question.) You will note that in only six of those years did the loss ratio not move in the same direction as the bonds and all six were in recession years when loss predictions would be more likely to be inaccurate. This pattern continues beyond the twenties, as it does with other measures of investment return. We are confident that more in-depth analyses would show the same trend. In order to collect a greater premium volume and the investment income that would result, as interest rates rise insurers are willing to take on greater risks with lower rates than they might otherwise use.

It is interesting to observe how loss ratios increased and then declined with interest rates in the twenties; then, after the

disruption of the first three years of the depression, declined with the historically low interest rates of the thirties; finally, making an upward trend matching that which has resulted in the historically high interest rates of today. A probable by-product of President Carter's recent policies on interest rates will be lower insurance rates and higher underwriting losses than we would otherwise experience.

Both the critics and the industry are wrong. The critics are mistaken in thinking the problems of high insurance rates can be solved through some proportional pass-through of investment income, as to some degree it already reflected in rates. The industry is wrong in insisting that the legitimacy of rates be determined almost solely through the underwriting results. This becomes obvious when one sees that underwriting losses or reduced margins are the natural result of a profit-seeking insurance industry.

The real issue is the total profit picture of an insurance line. Does the sum of the investment income and underwriting return obtained from a given line provide the investors in a given insurance company a sufficient rate of return on their investment? The prices of regulated industry are usually judged by the rate of return they give to equity holders. The U.S. Supreme Court has given the classic definition of the rate of return standard:

> ". . . The return to the equity owner should be commensurate with the returns on investments in other enterprises having corresponding risks." (Fed. Power Commission, U. Hope Natural Gas Co., 320 U.S. 591, 603 [1944]).

The California Department of Insurance does not set rates, but it is charged with considering the adequacy or excessiveness of rates. Our Insurance Department does not use any explicit rate of return criterion in judging rate legitimacy; thus, underwriting losses may be accepted as justification of large rate increases when an examination of the total profitability of a line shows it to be doing quite well.

With the rate of return standard in mind, most of the major issues in the traditional investment income controversy fall away. Does investment income "belong" to the policyholder or the company" Which part of investment income is from reserves; from unearned premiums, or from the policyholder's surplus? These issues are meaningless when the real issue is seen as rate of return, not redistribution of funds. The industry claims that investment income is not so great that inclusion would allow rate reductions. If so, then only with a clear rate of return analysis would any critic be convinced of it. Are mutuals outside the argument? No--by filling up the surplus, a mutual could still have excessive rates without its policyholders ever seeing the excess.

But some problems do not disappear, and here is where we get into the issue of method. First, why punish the companies with better than average portfolio returns by using the actual asset investment performance of each company. Not only would it be unfair, but why should companies bother to improve their portfolio performance if none of the return accrues to them? These are the most volatile and unpredictable parts of the insurance business.

Table I shows how these have made up the bulk of both the gains and the losses of the companies in recent years. The industry did very poorly in the years 1973 and 1974, yet it is clear that the actual magnitude of their total losses was the result of incredible stock market blunders (see, Forbes, April 15, 1976, p.30). Such unpredictable results are never used for discounting and should not be reflected in rates. Finally, how can any insurance department consider more than a few firms using in-depth company-by-company analyses?

In recent years, several methods of applying return on equity standards to insurance have been produced (see Bibliography). In a response to a call from the Massachusetts Insurance Commissioner, Dr. James M. Stone, for a practical method, Dr. William B. Fairley of that state's rating bureau, and others, produced a proposal using the "capital asset pricing model" which has become the darling of the business schools in the last ten years. This method avoids arguments over the investment incomes of individual insurance companies by postulating a hypothetical insurance company which puts all its investable assets into risk-free federal bonds. The return on equity that the stock market would demand from that firm could be calculated. Using the actual "tails" of each line, the competitive underwriting margin and rate for each one would be determined. Most companies would do better than this hypothetical firm by investing in riskier investments that could be seen as their reward on that risk. Firms that do worse than they would do with riskless investments have only themselves to blame and the policyholder would not suffer.

Under our wishfully named "open competition" system, actual rates which grossly and inexplicably deviate either above or below the calculated rates, would be considered more fully by the Insurance Department. If the rates still appear unjustified, the Department could exercise its legal option of declaring the rates inadequate or excessive.

The necessary changes in California law would be a simple matter. Chapter 8, Article 2, of the California Insurance Code "Making and Use of Rates," sets standards for the rating practices of casualty and liability insurers. The relevant part is Section 1852(b) which begins:

> "Consideration shall be given [in ratemaking] to the extent applicable, to past and prospective loss experience within and outside this state, to conflagaration and catastrophic hazards, to a reasonable margin for underwriting profit and contingencies . . ."

The term "underwriting profit" has been interpreted by some courts in other states as including income from investment; such an interpretation would serve our purpose. But many courts have ruled differently, and the California Insurance Department certainly doesn't interpret it that way (see, testimony of Angele Khachadour, General Counsel, Department of Insurance, at Insurance Company Practices interim hearing, July 22, 1977). The wording is too ambiguous in any case. Simply striking the word "underwriting" from that sentence might suffice, but it would be better to be more specific:

> ". . . to conflagaration and catastrophic hazards, to a reasonable return on equity after consideration of underwriting and investment income and contingencies . . ."

The practical application of these standards should be left to

the Commissioner.

Much more study is needed in the insurance area. There will be more forthcoming in our Series 1979 Report. At that time we will offer further conclusions and legislative recommendations.

TABLE I

TABLE I

ALL U. S. STOCK COMPANIES

Year	(1) % Return on Net Worth	(2) Underwriting Experience	(3) Net Interest Income	(4) Realized Capital Gains	(5) Unrealized Capital Gains
1976	22.2	- 855*	3,629*	249*	2,993*
1975	19.1	-2,598*	3,143*	127*	3,299*
1974	-14.9	-1,571*	2,891*	-101*	-6,040*
1973	- 2.7	490*	2,491*	429*	-4,366*
1972	22.7	1,190*	2,068*	265*	2,391*
1971	19.8	928*	1,785*	192*	1,439*
1970	7.0	104*	1,439*	177*	- 365*
1969	- 2.4	164*	1,238*	651*	-2,381*
1968	11.1	- 32*	1,100*	336*	842*
1967	13.5	147*	987*	225*	1,089*

(*All dollar amounts in millions)

Average: 1967-76 -- 9.5% -- without 1974 -- 12.3%

1970-76 -- 10.5% -- without 1974 -- 14.7%

1971-76 -- 11.0% -- without 1974 -- 16.2%

Source: Calculated from "Best's Aggregates and Averages," (1968-77 editions). Column 2, "Underwriting Experience," is the sum of statutory underwriting income and the equity in the change in unearned premiums through the year, but before federal taxes and dividends to policyholders. Column 5, "Unrealized Capital Gains," are discounted for taxes. Column 1, "Return on Net Worth," (or stockholder's equity) is calculated as net income divided by net worth, net interest income (Col. 3), realized capital gains (Col. 4)

and unrealized capital gains (Col. 5), less 20% for taxes (16% is the average effective capital gains rate for the United States) and underwriting experience, minus federal taxes and dividends to policyholders. Net worth is the statutory policyholder's surplus on January 1 of the year in question, plus the equity in unearned premiums on that date. The equity multiplier for each year is based upon commissions and brokerage fees plus 80% of other underwriting expenses, all divided by premiums written.

TABLE II

TABLE II

90-DAY TREASURY BONDS-LOSS RATIO

Year	90-day Treasury Bonds	Loss Ratio
1976	5.0	74.6
1975	5.8	78.8
1974	7.9	75.3
1973	2.0	68.6
1972	4.1	66.0
1971	4.3	66.7
1970	6.5	69.7
1969	6.7	70.3
1968	5.3	68.8
1967	4.3	67.2
1966	4.9	66.2
1965	4.0	69.2
1964	3.5	68.0
1963	3.2	66.3
1962	2.8	64.5
1961	2.4	64.4
1960	2.9	63.6
1959	3.4	62.5
1958	1.8	63.7
1957	3.3	66.2
1956	2.7	63.4
1955	1.8	58.2
1954	1.0	56.9
1953	1.9	57.2
1952	1.8	58.4

Source: For "Loss Ratio" "Best's Aggregates and Averages;" for "90-day Treasury Bonds," "Historical Statistics of the United States" (1975 Ed.) and "Economic Indicators" (Nov. 1977 Ed.), Published by Joint Economic Committee, U. S. Senate.

78-312

MEDICAL MALPRACTICE LIABILITY

MEDICAL MALPRACTICE LIABILITY

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INTRODUCTION

Among the continuing concerns of the California Legislature is the subject of medical malpractice. In response to a medical malpractice situation reaching crisis proportions, the Legislature enacted several unprecedented tort reforms in the Medical Injury Compensation Reform Act of 1975 (MICRA). While the short passage of time since adoption of the Act precludes one from ascertaining the success of MICRA, nevertheless there is some evidence warranting some corrective legislation to promote the Act's intent and effectiveness.

After considerable research on the current medical malpractice situation, both within California and nationwide, the Joint Committee staff drafted the recommendations contained herein, in their judgment as the best means to respond to developments in medical professional liability. Also contained within with report is a brief history of conditions within California precipitating the passage of MICRA, a summary of MICRA's provisions, results of a recent Questionnaire sent to defense and plaintiff attorneys soliciting opinions on medical malpractice issues, and a short description of legislation on medical professional liability enacted nationwide.

I

MEDICAL MALPRACTICE IN CALIFORNIA--1973 TO 1975

Perhaps the most appropriate starting point for a discussion of medical professional liability in California is the perceived

medical malpractice crisis of 1973-1974[1] which was characterized by skyrocketing insurance premiums for health care providers and astronomical increases in health care costs for consumers. The crisis has been attributed to several causes:[2] 1) a profit-oriented insurance industry, 2) negligent health care providers; 3) litigious consumers, and 4) over zealous attorneys.

Ever since the cost of medical professional liability insurance premiums began to escalate first doubling, then tripling, the insurance industry has been considered one of the major culprits of the "crisis." It has been alleged that large stock market losses incurred by the industry during the early 1970's caused insurers to raise malpractice premiums as a means of making up their investment losses. Insurers, on the other hand, attribute the escalation in premium rates to the unanticipated increase in the number of malpractice claims filed.

The medical profession has also been accused of being a contributor to the malpractice "crisis." Several circumstances attesting to the health care profession's involvement in the "crisis" including: the increased availability of physician experts to testify against another practitioner in malpractice litigation; an increase in advanced medical technology high risk

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[1]Some parties profess that no real crisis occured, but was instead concocted by the insurance industry to justify its unprecedented increase in medical malpractice premiums.

[2]For a more detailed history of the evolution of medical malpractice liability, refer to the Report of the California Citizens' Commission on Tort Reform entitled, Righting the Liability Balance, pp. 68-72 (1977).

procedures; a lack of sufficient continuing education requirements to update practitioners' skills and to assure physicians have ready access to information of safer and more advanced medical methods, and lastly, health care providers' alleged lack of sufficient measures to generate quality control. Pointing to a supposedly unrealistically low number of license revocations and suspensions by the old Board of Medical Quality Examiners,[3] critics have alleged that inadequate disciplinary action has been taken against grossly negligent practitioners.

Consumers constitute the third purported "party" contributing to the "crisis." Disintegration of the doctor-patient relationship induced by the decline in the ranks of the family doctor and the accompanying increase in specialization on the part of the physician have resulted in an increased willingness of patients to sue their doctors. Additionally, changes in the law of torts may have encouraged litigation by expanding the scope of what constitutes medical malpractice. The decline of the locality rule, expansion of the doctrine of "res ipsa loquitur" and emergence of the concept of "informed consent" can all be considered as fuel for the medical malpractice problem.

Lastly, the legal profession has been criticized for its involvement in medical malpractice litigation. Plaintiffs' attorneys primarily bear the wrath of this criticism. A failure to weed out unmeritorious and nuisance claims, involvement of

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[3]Statistics from the Board of Medical Quality Examiners on file in the Joint Committee on Tort Liability office.

plaintiff attorneys who are inexperienced in medical malpractice, and attractiveness of large contingency fees are all factors allegedly contributing to the malpractice problem.

In short, whoever the instigator and whether contrived or not, the medical malpractice problem reached epidemic proportions by 1975. All segments of California society were affected. Consumers suffered astronomical escalations in health care costs passed on by health care providers to compensate for their increased malpractice premiums. Health care practitioners were plagued by 300% plus increases in professional liability insurance premiums which in turn resulted in: an increase in the number of practitioners going "bare" (without insurance); a reluctance of physicians to accept both new patients and medi-cal patients; practice changes, e.g., large number of obstetricians and family physicians dropped obstetrical practice and coverage which demanded one of the highest premiums.[4] Lastly, it has been alleged that even the insurance industry, often pointed to as the primary villain of the "crisis," sustained damage when medical malpractice insurance became unattractive from a profit standpoint.

II

AB 1XX -- CALIFORNIA'S RESPONSE TO THE "CRISIS"

The Medical Injury Compensation Reform Act of 1975, also known as AB 1XX or MICRA, constituted California's response to the "crisis." What follows is a brief summary of the provisions of AB 1XX.

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[4]Preliminary Report of Medical Malpractice, Hiestand, F., (1975).

A. Civil Code Section 3333.1. Introduction of evidence of plaintiff's collateral source benefits and the acquisition cost thereof, together with elimination of any claim for subrogation made by the collateral source.

B. Civil Code Section 3333.2. Limit on recovery of plaintiff's nonpecuniary loss to $250,000.

C. Code of Civil Procedure Section 667.7. Provision for periodic payments of judgments for medical malpractice in situations where awards for future damages equals or exceeds $50,000.

D. Code of Civil Procedure Section 340.5. Shortening of statute of limitations for medical malpractice actions to three years after date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first.

E. Code of Civil Procedure Section 364. Requiring 90 days notice be given to defendant as a condition precedent to commencing a medical malpractice suit. Section 365 provides for sanctions against attorneys who fail to give the 90 days notice before filing suit.

F. Code of Civil Procedure Section 1295. Providing for voluntary arbitration of medical malpractice claims.

G. Business and Professions Code Section 6146. Limiting contingency fee recoveries to a prescribed scale.

H. Establishment of a Board of Medical Quality Assurance with prescribed powers and duties.

III

LEGISLATIVE RESPONSES TO A PERCEIVED MEDICAL MALPRACTICE CRISIS

The medical malpractice crisis which allegedly plagued California in 1975 was not unique to the Golden State. In response to crises of epidemic proportions, several states enacted legislation. The following is a summary of the various forms of state legislative responses to a medical malpractice dilemma.[5]

A. Limitations on Liability for Damages. Several states have enacted legislation imposing a maximum ceiling on the amount of damages a plaintiff in a medical malpractice case may recover.[6] A number of the states, including California, place limitations on plaintiff's recovery of "pain and suffering" awards and other noneconomic items, rather than an overall restriction on all damages.[7]

Some jurisdictions integrate ceilings on recovery with patient compensation funds and physician mutual insurance companies. In Wisconsin, for example, a $500,000 limitation on damages is

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[5]The format of this summary is borrowed from the American Medical Association's State Health Legislative Report, Vol. 5, No. 1, May 1977. While the AMA report only reviews legislation enacted in various states from 1975 through December, 1976, this summary reflects updated material and includes the citation and the text of various states' statutes alluded to in the AMA report.

[6]State Health Legislative Report, Vol. 5, No. 1, May, 1977 lists: California, Idaho, Illinois, Indiana, Louisiana, Nebraska, New Mexico, Ohio, South Dakota, Virginia and Wisconsin as states who have enacted some form.

[7]California Civil Code Section 3333.2.

triggered once the reserve in the patient compensation fund falls below a specified amount in any calendar year.[8] A statutory provision in North Dakota provides for a limitation on individual liability of physicians who belong to a physician mutual insurance company. In the event that it is determined physicians are having difficulty obtaining medical malpractice insurance coverage, the North Dakota State Board of Medical Practice is statutorily empowered to authorize formation of a physician mutual insurance company and extend to the company's members a $500,000 ceiling on their personal liability.[9]

B. Itemized Awards. Generally medical malpractice awards are rendered without itemizing the verdict. The jury is not required to designate which portions of the award are to compensate the plaintiff for such damages as lost income, medical expenses, pain and suffering, et cetera. Contrary to the general

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[8]Wisconsin Insurance Code Section 655.23 requires every health care provider permanently practicing in Wisconsin to pay a yearly assessment into a patients' compensation fund. This section also states that health care providers exhibiting requisite financial responsibility through either liability insurance, self-insurance, or posting of a surety bond shall be "liable for malpractice for no more than $200,000 per claim and $600,000 per year or the maximum liability limit for which the provider is insured." Wisconsin Insurance Code Section 655.27(6) provides: "If at any time after July 1, 1979, the commissioner finds that the amount of money in the fund has fallen below a $2,500,000 level in any one year, or below a $6,000,000 level for any 2 consecutive years, an automatic limitation on awards of $500,000 for any one injury or death on account of malpractice shall take effect . . . This subsection does not apply to any payments for medical expenses."

[9]North Dakota's Insurance Code Section 26-40-11.

trend, Florida, Illinois and New York enacted statutes requiring that juries in medical malpractice cases distinguish elements of the award according to several statutorily defined categories.[10]

C. Periodic Payments. California is among a minority of states who require that plaintiff recipients of medical malpractice awards receive their monies in periodic payments.[11] States which have enacted various forms of periodic payment schedules include: 1) Alabama; 2) Alaska; 3) California; 4) Delaware; 5) Florida; 6) Kansas; 7) Maryland; 8) New Mexico; 9) Utah; 10) Washington, and 11) Wisconsin.

D. Punitive Damage Provisions. Punitive damages, those damages which are intended to penalize the defendant rather than compensate the plaintiff, are generally awarded only in those instances where the defendant is found to have acted with malice or wanton and willful misconduct. Consequently, punitive damages are seldom awarded in medical malpractice cases which usually involve negligence and not malice or wanton conduct. Despite the limited role of punitive damages in malpractice suits, several

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[10]For example, New York's Civil Practice Law and Rules (CPLR) Section 4111(d) provides, in relevant part, "In a medical malpractice action the court shall instruct the jury that if the jury finds a verdict awarding damages it shall in its verdict specify the applicable elements of special and general damages upon which the award is based and the amount assigned to each element, including but not limited to medical expenses, loss of earnings, impairment of earning ability, and pain and suffering." While the above requirement is imposed only in jury-tried cases, a similar provision applicable to trial by judge can be found in the 1976 amendment of CPLR 4213(b).

[11]California Code of Civil Procedure, Section 667.7.

states have enacted legislation addressing itself specifically to punitive damage awards in medical malpractice cases. For example, in New Mexico punitive damages are to be paid by the person liable rather than by the defendant's medical malpractice insurance, unless expressly provided for by the state's patient compensation fund.[12] In Delaware, a statute provides that only in cases where malicious or wanton misconduct is shown will punitive damages be permitted.[13]

E. Advance Payments to Plaintiff Without Penalizing Defendants. Several states have enacted legislation providing that payments made to a plaintiff prior to final judgment or settlement by a defendant or his insurer shall not constitute an admission of liability on behalf of the defendant.[14] Where some

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[12]New Mexico's Insurance Code Section 58-33-7H provides: "A judgment of punitive damages against a health care provider shall be the personal liability of the health care provider. Punitive damages shall not be paid from the patient's compensation fund nor from the proceeds of the health care provider's insurance contract unless the contract expressly provides coverage."

[13]Delaware Annotated Code 18 Section 6855 provides, in relevant part, "In any action for malpractice, punitive damages may be awarded only if it is found that the injury complained of was maliciously intended or was the result of willful or wanton misconduct by the health care provider . . . Injuries shall not be considered maliciously intended in instances in which unforeseen damage or injury results from intended medication, manipulation, surgery, treatment or the intended omission thereof, administered or omitted by mistake to or for the wrong patient or wrong organ (60 Del. Laws, C. 373, Sec. 1).

[14]Alabama, Alaska, Connecticut, Delaware, Hawaii, Indiana, Kentucky, Louisiana, Maryland, Nebraska, New Mexico, Nevada, Pennsylvania, Texas, Washington, West Virginia and Wisconsin are among the list of states who have enacted legislation concerning advance payments.

liability on the part of the defendant is undisputed, it is not uncommon for a defendant's insurance carrier to advance the plaintiff monies for economic hardship resulting from illness and incapacity. To encourage this practice, various states have enacted statutes making evidence of these advance payments inadmissible or precluding their use as admissions of liability. Often provisions for offsetting plaintiff's final judgment or settlement by the amounts advanced are included in those statutes.

F. Rules Relating to Locality. Medical malpractice litigation "locality rules" have been relaxed in recent years. Under the locality rule, for a physician to be held liable for medical malpractice, he/she must have violated the standard of care for an alike physician within the local community:

> "Formerly, it was generally held that allowance must be made for the type of community in which the physician carries on his practice . . . Improved facilities of communication, available medical literature, consultation and the like, led gradually to the abandonment of any fixed rule . . . In a few jurisdictions, the 'locality rule' has been entirely discarded, and the general standard applied in all cases." (Prosser, William L., Handbook of the Law of Torts, West Publishing Co., [1971] p. 164).

In view of the trend to abandon the "locality rule," several states have enacted statutes attempting to define the "locality" upon which a "standard of care" will be based. Some statutes go so far as to provide that, for some malpractice proceedings, the applicable standard will be defined according to general practices of the profession rather than a standard of care of a geographic

region or locality.[15]

Several jurisdictions have also passed legislation limiting the testimony of expert witnesses to a particular standard of conduct. For example, Delaware, Idaho, Louisiana, Michigan, Nevada and Oklahoma have enacted statutes requiring the presentation of expert testimony at trial for those claims based on negligence.[16]

G. Collateral Source Provisions. The collateral source doctrine is engrained in the rules of evidence precluding introduction of any evidence of compensation plaintiff has received for his/her injuries from sources other than the defendant. For example, payments made to the plaintiff from his/her private insurer or through Workers' Compensation may not be introduced as evidence under the collateral source rule.

Because of mounting sentiment that exclusion of collateral source evidence may result in windfall recoveries to plaintiff,

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[15]Arkansas statute provides that a pre-trial hearing panel "shall not be bound or limited by the standard of care accepted or established with respect to any particular geographical area or locality, but shall consider only whether the person against whom the claim is made has acted with due care having in mind the standards and recommended practices and procedures of his profession, and training, experience and professed degree of skill by the average practitioner of such profession, and all other relevant circumstances."

[16]As an example of this type of legislation, Delaware Annotated Code 8 Section 6853 states: "No liability shall be based upon asserted negligence unless expert medical testimony is presented as the the alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury or death . . ."

various states have passed legislation abrogating or altering the collateral source rule. California is among several states enacting statutes providing for introduction of evidence of plaintiff's payments from sources other than the defendant.[17] This approach permits the jury to consider the total amounts of compensation the plaintiff will receive pursuant to its verdict.

Other states have enacted provisions that compensation plaintiff receives from collateral sources shall be offset against any jury award.[18] The crucial difference between this type of approach and the California practice is that the jury is unaware of any collateral source payments made to the plaintiff until it reaches its final determination.

H. Requirement of Notice of Intent To Sue. A few states, including California, require plaintiff to notify defendant of his intention to sue prior to filing an action for medical malpractice.[19] For a specified time, usually 60 to 90 days subsequent to service of the notice, the applicable statute of limitations is tolled. In some states which allow tolling of the limitation period, when notice of intention to sue is given, there is also a statute allowing a time for filing suits beyond the running of the statute of limitations.

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[17]Arizona, Delaware, Kansas, New York, Rhode Island, and Washington are among the other states who have enacted legislation similar to California's relating to the collateral source rule.

[18]Alaska, Florida, Idaho, Illinois, Iowa, Nebraska, Ohio, Pennsylvania, and Tennessee have all altered their collateral source provisions in accordance with and offset against final judgment.

[19]California Code of Civil Procedure Section 364.

I. Ad Damnum Clauses. The ad damnum clause refers to the plaintiff's statement of damages which he claims in his initial pleadings. Often in personal injury actions, medical malpractice claims being no exception, this amount is inflated and does not necessarily reflect the plaintiff's true damages. Inflated prayers can present special problems to juries who are requested to determine future damages, e.g., "pain and suffering." To remedy the problem, approximately fifty percent of the states, California included, have passed legislation either eliminating or modifying the ad damnum clause.[20]

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[20]The California Code of Civil Procedure Section 425.10 provides: "A complaint or cross-complaint shall contain both of the following: (a) A statement of the facts constituting the cause of action, in ordinary and concise language; (b) A demand for judgment for the relief to which the pleader claims he is entitled. If the recovery of money or damages be demanded, the amount thereof shall be stated, unless the action is brought in the superior court to recover damages for personal injury or wrongful death, in which case the amount thereof shall not be stated."

Section 425.11 provides: "When a complaint or cross-complaint is filed in an action in the superior court to recover damages for personal injury or wrongful death, the party against whom the action is brought may at any time request a statement setting forth the nature and amount of damages being sought. The request shall be served upon the plaintiff or cross-complainant, who shall serve a responsive statement as to the damages within 15 days thereafter. In the event that a response is not served, the party, on notice to the plaintiff or cross-complainant, may petition the court in which the action is pending to order the plaintiff or cross-complainant to serve a responsive statement. If no request is made for such a statement setting forth the nature and amount of damages being sought, the plaintiff shall give notice to the defendant of the amount of special and general damages sought to be recovered (1) before a default may be taken; or (2) in the event an answer is filed, at least 60 days prior to date set for the trial."

J. Contingent Fee Provisions. It is common among plaintiffs' attorneys to charge their clients on a contingent fee arrangement. A typical fee agreement provides that the attorney is to receive a percentage, often 30-50%, of the final judgment or settlement award the plaintiff receives. Usually the fee excludes other costs including expert witness, filing fees, and incidental expenses. It is important to note, however, if the plaintiff loses in court, the attorney receives no compensation.

To regulate the contingent fee arrangement, about 50% of the states have enacted legislation characterized by several approaches. One approach empowers the court to review the attorney's proposed fee and approve that which it deems reasonable. A second, and more popular, is to provide for a sliding scale for fees based upon the size of the award. California is among those states following the latter course.[21]

K. Liability for Opposing Parties' Expenses, Costs and Fees. As a means of discouraging frivolous malpractice suits, a few states have adopted legislation providing that a party pursuing such a suit may be found liable to the opposing party for attorney and expert witness fees, as well as court costs.

Pennsylvania, Rhode Island, Illinois and Nebraska have all enacted statutes permitting fee sanctions against the unsuccessful party in frivolous litigation. Nebraska and Rhode Island allow costs and reasonable attorneys' fees according to the court's

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[21]California Business and Professions Code Section 6146.

discretion.[22] In Rhode Island, if a physician is found not liable pursuant to a mediation panel's judgment and, after all appellate rpocesses have been exhausted, the court has the discretion to award costs incurred in the action by the defendant, including costs of the mandatory mediation panel and reasonable attorneys' fees.[23]

In 1975, Pennsylvania enacted a statute similar to California's SB 1362 (Chapter 743 Public Laws 1975, CCP Sec. 1141.10, et. seq.) providing that one appealing a compulsory arbitration panel decision shall be liable for all costs of arbitration and trial if the court determines the appeal is "capricious, frivolous and unreasonable . . ."[24] Under Senator Smith's bill, SB 1362,

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[22]Revised Statutes of Nebraska (1978); Nebraska Hospital Medical Liability Act Section 44-2834. "(2) In all cases against health care providers for malpractice or professional negligence, the court may, upon application by the prevailing party, in its discretion and in an amount determined in its discretion as costs payable to the prevailing party the reasonable costs of preparation and trial, including reasonable attorneys' fees and the reasonable loss of earnings by the prevailing party occasioned by the trial, if the court finds that the losing party did not have a reasonable chance of recovery or a reasonable chance of a successful defense."

[23]General Laws of Rhode Island (1977 Supp.) 10-19-9. Additionally, this statute provides that health care providers who remain liable after all appellate processes have been exhausted may be taxed for costs incurred by the opposing party.

[24]Purdon's Pennsylvania Statutes Annotated Title 40, Section 1301.409, states: "Appeals from determinations made by the arbitration panel shall be trial de novo . . . If the court of common pleas finds at the completion of the trial that the basis for the appeal was capricious, frivolous and unreasonable, then the appellant shall be liable for all costs of arbitration and trial, including record costs, arbitrator's compensation, discovery costs, and fees and expenses of the arbitration panel's expert witnesses."

supra., a party, unhappy with the arbitration award, who elects to proceed to trial but does not obtain a more favorable result, is responsible for arbitrator's costs together with all costs accruing after the request for the trial, including expert witness fees.

III

MEDICAL MALPRACTICE QUESTIONNAIRE RESPONSES

A Questionnaire was sent to 114 attorneys and law firms in California specializing in medical malpractice. The attorneys or firms were selected from names provided by the California Trial Lawyers Association, Association of Defense Counsel, and defense counsel knowledgeable in medical malpractice litigation. Fifty-one percent of the plaintiff attorneys and forty-four of the defense attorneys responded for an overall response rate of forty-seven percent. The survey contained questions relevant to current medical malpractice concerns in California.

A. Arbitration.

1. Which type of arbitration would you support?

   a. Voluntary and binding;
   b. Voluntary and non-binding (with no penalties attached);
   c. Voluntary and non-binding (with penalties attached--court costs and attorneys fees to be paid by the party who, dissatisfied with an arbitration proceeding result, goes into court and suffers a judgment equal to or less than the arbitration award);
   d. Mandatory and non-binding (with no penalties attached);
   e. Mandatory and binding.

	TOTAL	PLAINTIFF	DEFENDANT
a.	32%	42%*	26%
b.	11%	26%	3%
c.	43%*	21%	56%*
d.	--	--	--
e.	9%	11%	9%
**f.	5%	--	6%

Comments: a) The major problem with arbitration is the difficulty of getting unbiased, experienced arbitrators. One respondant suggested conditions be placed on the selection of arbitrators; b) due to the excessive cost incurred in arbitration, penalties should be imposed on parties who, dissatisfied with the results of arbitration, later seek a jury trial.

2. For those cases with a prayer of $15,000 or more, arbitration should be:

a. Mandatory	13%	16%	12%
b. Voluntary	83%*	79%*	85%*
c. None	4%	5%	3%

B. Punitive Damages.

3. Do you agree or disagree with the concept of punitive damages?

a. Agree	62%*	100%*	41%
b. Disagree	38%	0	59%*

4. Should plaintiff be the sole beneficiary of punitive damages assessed against a defendant?

a. Yes	51%*	84%*	31%
b. No	49%	16%	69%*

5. If plaintiff should not receive all of punitive damages, should such damages be held in a fund for persons who have suffered injuries as a result of conduct similar to that of defendant?

a. Yes	37%	48%*	32%
b. No	53%*	29%	65%*
**c. N/A	10%	23%	3%

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*--Most favored response; **--Write-in.

Comment: The idea of a fund is appealing, but the cost of administering such a program would outweigh its benefit.

6. If you currently disfavor punitive damages, would you alter your opinion if the damages went into a fund as opposed to the plaintiff?

	TOTAL	PLAINTIFF	DEFENDANT
a. Yes	18%	0	29%
b. No	47%*	24%	61%*
**c. N/A	35%	76%*	10%

C. Corporate Responsibility.

7. Would you favor a statewide program of corporate responsibility where a single encompassing insurance policy covered a hospital and all the staff, including physicians with staff privileges, for negligent acts occurring within the hospital?

a. Yes	43%	74%*	20%
b. No	57%*	26%	80%*

Comments: Of the respondents commenting favorably on Question #7, all plaintiff attorneys gave the following reasons: a) This is one method of protecting victims and assisting in minimizing negligence by peer pressure and hospital staff pressure in order to keep premiums down, and b) by making the hospital responsible for the actions of its staff, more careful selection and review of its staff will result.

Respondents who disagreed with this concept both defendant and plaintiff attorneys, cited the following reasons: a) unworkable; b) creates possible conflicts of interest; c) provides a fertile environment for cover-up; d) causes an increase in cost of daily hospital care, and 3) causes a deterioration in quality of medical care.

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*--Most favored response; **--Write-in.

D. Board of Medical Quality Assurance.

8. Do you agree with the present reporting requirements of the BMQA where a physician who suffers a settlement, arbitration award or court judgment of $3,000 or more must be reported? (See, Sections 801, 802 and 803 of Business and Professions Code).

	TOTAL	PLAINTIFF	DEFENDANT
a. Agree	28%	5%	41%
b. Disagree	72%*	95%*	59%*

Comments: Respondents generally emphasized their disapproval of the reporting requirements and contended that it is unrealistic in a medical malpractice setting for the following reasons:

a) A settlement by its very nature is not an admission of liability, guilt or negligence. Most doctors refuse to give consent to a settlement, because of the fact that it will automatically be referred to the Board of Medical Quality Assurance for further investigation. The doctor would rather take his chances on the jury finding that there is no responsibility, or, in the alternative, if a verdict is rendered against him, obtaining a decision from a judge under Section 802 of the Business and Professions Code that his conduct was not such as to be reportable to the Board of Medical Quality Assurance.

b) A settlement of $3,000 is truly only of nuisance value and does not even cover the cost of defense in most medical malpractice cases. If a doctor, for example, should even settle a malpractice case for $5,000, it could be just an economic

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*--Most favored response

consideration on the part of the insurance company in avoiding a costly and lengthy medical malpractice trial.

c) The $3,000 reporting requirement prevents settlements of cases which should be settled. Unfortunately, the reporting statutes cause litigation rather than limit it, and it is probably the major drawback to the average medical malpractice case being disposed of amicably. This is particularly true of the smaller case. There is no question but that the larger case will be settled whether there is a reporting statute or not. However, all cases worth between $10,000 and $30,000 are not settled because of the reporting statute.

d) A much more sensible approach to this problem would be to require a doctor to report judgments in excess of $10,000. At least in a case where a jury has returned a verdict against the doctor, there is a finding of the trier of fact that there has been negligence. Contrast this with a settlement where there is no admission of liability or negligence. Coupled with such an act could also be a provision that if a doctor settles more than five cases within a three-year period (similar to automobile insurance company practices in raising rates with three settlements within a three year period), then this would be something that should be reported to the BMQA. Certainly one or two isolated settlements is not an admission of any negligence or any guilt on the part of the doctor. However, if a doctor has to settle as many as five cases within a three year period, this may be an indication of a negligent doctor and something that should be

reported to the BMQA. Furthermore, if a doctor enters into a settlement for the sum of $25,000, this is more than just a nuisance settlement, but one where obviously both sides recognize a substantial danger of the doctor proceeding to trial on the issue of negligence. This, therefore, would probably be something that should be reported to the BMQA.

9. Would you advocate raising the monetary reporting amount in Business and Professions Code sections 800, 801 and 802 from $3,000 to $15,000?

	TOTAL	PLAINTIFF	DEFENDANT
a. Yes	67%*	78%*	61%*
b. No	33%	22%	39%

Comments: a) One respondent suggested reporting all cases or none; b) many respondents acknowledged that raising the reporting amount to $15,000 is more realistic and less intimidating to doctors.

10. Would you advocate raising the monetary reporting amount in Business and Professions Code sections 800, 801 and 802 from $3,000 to $30,000?

a. Yes	46%	61%*	38%
b. No	52%*	33%	62%*
**c. No comment	2%	6%	--

Comment: Plaintiff attorneys agreed that a reporting amount of $30,000 is more realistic considering present inflation.

11. Which reporting amount would you most favor?

a. $ 3,000	26%	11%	35%
b. $15,000	22%	21%	24%
c. $30,000	42%*	47%*	38%*
**d. $50,000	2%	5%	0
**e. 0	8%	16%	3%

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*--Most favored response; **--Write-in.

Comments: a) One respondent favored no reporting amount; b) suggestion that only awards and judgments should be reported; c) respondents favored a $30,000-$50,000 reporting amount and claimed a higher limit would reduce trials and still allow for inquiry; d) most respondents favored a higher reporting amount, if one is to exist.

E. No-Fault.

12. Would you be in favor of a no-fault program for medical malpractice?

	TOTAL	PLAINTIFF	DEFENDANT
a. Yes	2%	0	3%
b. No	98%*	100%*	97%*

Comments: a) "Hell, no!"; b) "No-fault is idiotic!"; c) fault concept enhances personal responsibility; d) no-fault eliminates compensation for pain and suffering; 3) no-fault program for medical malpractice would dangerously increase the number of malpractice claims, rather than decrease them, by accepting cases that are currently considered non-meritorious. Studies indicate it would be economically disastrous.

F. 90-Day Notice.

13. Do you feel that CCP Sections 364 and 365, requiring a plaintiff and his attorney to give the defendant in a medical malpractice suit 90 days notice that a complaint is being filed against him/her, are being complied with?

a. Yes	62%*	61%*	62%*
b. No	37%	33%	38%
**c. Partly	1%	6%	--

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*--Most favored response; **--Write-in.

14. Do you agree that the 90-day notice requirement is working to facilitate early settlements?

		TOTAL	PLAINTIFF	DEFENDANT
a.	Agree	30%	0	45%
b.	Disagree	70%*	100%*	55%*

Comments: a) The 90-day notice is worthless in generating any settlements. All it does is to allow the defendants time to alter records and data. It should be withdrawn; b) all the 90-day notice statute does is to delay the plaintiff's recovery by an additional three months.

15. From your experience, what percentage of 90-day notices mature into suits where a complaint is actually filed?

a.	Less than 50%	17%	19%	0
b.	75%-100%	83%*	81%*	100%*

Comment: One respondent noted that he believes the statute is unconstitutional and consequently does not comply with it.

16. Are you supportive of Business and Professions Code section 6146 where limits are imposed on the contingent fees a plaintiffs' attorney can collect in a medical malpractice case?

a.	Yes	61%*	11%	91%*
b.	No	39%	89%*	9%

Comments: a) Fee schedule is unfair to the patient where it provides for only 10% fees over $200,000. The provision imposes an impossible conflict of interest between plaintiff and counsel in such cases and should be replaced by a fee schedule

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*--Most favored response; **--Write-in.

across the board regardless of the percentage at which it is set; b) it is contrary to the concept of free enterprise; c) there are allegations that many plaintiffs' attorneys avoid taking an otherwise meritorious case due to the fact that illogical and arbitrary limits on his fees are set by statute. It is furthermore illogical to place contingent fees in medical malpractice cases at certain statutory limits when no other area of tort law is so regulated.

17. Do you feel plaintiffs' attorneys are complying with Business and Professions Code Section 6146?

		TOTAL	PLAINTIFF	DEFENDANT
a.	Yes	49%*	83%*	24%
b.	No	44%	6%	72%*
**c.	Uncertain	7%	11%	4%

18. Do you think some type of ceilings should be enacted into law restricting defense attorneys' fees?

a.	Yes	14%	11%	16%
b.	No	84%*	84%*	84%*
**c.	No response	2%	5%	--

19. In your opinion, does the marketplace and competition among medical malpractice defense attorneys function satisfactorily to assure that defense costs are kept low?

a.	Yes	84%*	56%*	100%*
b.	No	16%	44%	0

Comment: After answering yes, one defense attorney commented, "however, I may be biased."

G. Quality of Health Care.

20. Do you agree that AB 1XX has improved the quality of health care?

a.	Agree	25%	6%	41%
b.	Disagree	68%*	83%*	55%*
**c.	Uncertain	7%	11%	4%

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*--Most favored response; **--Write-in.

Comments: a) AB 1XX has had no impact; b) "It's a disgrace! The victims of malpractice have been severely inhibited in their abilities to get redress. When a lawyer's fees are unreasonably limited, as they are under AB 1XX, the victim loses."; c) the quality of health care has deteriorated under AB 1XX; d) the only thing AB 1XX has done is to create an environment in which insurance companies flourish; e) many respondents felt in no position to render an evaluation of health care subsequent to enactment of AB 1XX.

H. Impact of American Motorcycle Assn. v. The Superior Court of Los Angeles County.

21. Have you found that the AMA decision has encouraged settlements?

		TOTAL	PLAINTIFF	DEFENDANT
a.	Yes	20%	21%	19%
b.	No	78%*	74%*	81%*
**c.	No basis	2%	5%	--

I. Periodic Payments.

22. Do you agree that an injured plaintiff should receive his/her award in periodic payments and correspondingly the attorney receive that portion of the contingent fee related to the periodic payment?

a.	Yes	58%*	5%	88%*
b.	No	40%	89%*	12%
**c.	No response	2%	6%	--

Comment: The majority of comments argued for leaving it up to the attorney and client to decide whether the award and contingent fee are received in periodic payments. The same reasons as in Question No. 16 were given.

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*--Most favored response; **--Write-in.

J. Physician Discipline.

23. From your experience, do hospital disciplinary proceedings sufficiently comply with due process?

	TOTAL	PLAINTIFF	DEFENDANT
a. Yes	62%*	33%	76%*
b. No	31%	56%*	18%
c. Uncertain	7%	11%	6%

24. Would you favor a system where hospital disciplinary proceedings of a designated magnitude were subject to judicial review to assure due process was complied with?

a. Yes	65%*	89%*	50%
b. No	35%	11%	50%

Comment: In effect, this is accomplished now by reason of the threat of suit if due process is not complied with.

25. Would you favor amending Civil Code Section 43.7 and 43.8 to provide for an absolute immunity as opposed to a conditional immunity, providing there existed some guarantee that a physician could secure judicial review that his/her due process in a hospital disciplinary proceeding had been violated?

a. Yes	74%*	59%*	82%*
b. No	20%	29%	15%
**c. No response	6%	12%	3%

Comment: The present system works adequately to assure due process.

26. Would you agree that such an amendment could set the stage for encouraging members of hospital review committees to report to BMQA pursuant to Business and Professions Code Section 805 and impose sanctions on them for failure to report, since amending Civil Code sections 43.7 and 43.8 may alleviate the hospital committee's fear of countersuit from the disciplined physician?

a. Yes	67%*	65%*	68%*
b. No	27%	24%	29%
**c. Uncertain	6%	11%	3%

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*--Most favored response; **--Write-in.

Comment: It "could," but probably won't.

Of special interest are the results from the seven questions number below which received a consensus from both defense and plaintiff attorneys. They are:

2 -- Agree that for those cases with prayers exceeding $15,000, arbitration should be voluntary;

8 -- Against $3,000 present reporting requirement;

9 -- For raising the reporting requirement from $3,000 to $15,000;

#12 -- Against a no-fault program for medical malpractice;

#15 -- Majority (75%-100%) of 90-day notices mature into suits;

#18 -- Against enacting a law to restrict defense attorneys' fees.

The areas where plaintiff and defense counsel strongly differed in their responses are:

4 -- Whether plaintiffs should be the sole beneficiaries of punitive damage awards;

7 -- Whether a system of corporate responsibility encompassing hospitals and physician staff within a single insurance policy is favored;

8 -- On limiting the contingent fee a plaintiffs' attorney can collect in medical malpractice cases (Business and Professions Code Section 6146);

9 -- Whether plaintiffs' attorneys are complying with the contingent fee limitations imposed by law;

#22 -- Whether medical malpractice awards should be paid in periodic payments.

IV

RECOMMENDATIONS

Based upon staff research, contacts with plaintiff and defense counsel, meetings with doctors, advisory committee meetings and contact with other states, the staff of the Joint Committee on Tort Liability: identified issues and possible solutions; attempted to test the solutions, and arrived at tentative recommendations. Staff would appreciate thoughtful comments, criticisms or suggestions relative to the recommendations. In arriving at the recommendations, staff sought to:

A. Encourage settlements and the use of pretrial devices such as arbitration as cost-saving measures;

B. Assure a high quality of medical care predicated on the premise that quality control will limit malpractice;

C. Amend existing legislation to promote its intent and effectiveness.

Recommendation No. 1: CONSOLIDATING C.C.P. SECTION 364 (REQUIRING 90-DAY NOTICE TO BE GIVEN TO A DEFENDANT IN A MALPRACTICE SUIT PRIOR TO COMMENCEMENT OF THE SUIT) WITH AB 3670 CERTIFICATE OF MERIT WHICH REQUIRES THAT A PLAINTIFF'S MALPRACTICE CLAIM BE CERTIFIED BY PHYSICIANS (COPIES OF BOTH PIECES OF LEGISLATION ARE ENCLOSED).

The language in AB 3670 and the 90-day notice provision of AB 1XX in the Code of Civil Procedure, Section 364, reveals that

the two could be consolidated into one provision. It appears that CCP Sec. 364(b) already contains language pertaining to an AB 3670 certificate of merit:

> CCP Sec. 364(b). "No particular form of notice is required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained including what specifically the nature of the injuries suffered."

The legal basis of the claim could be construed to mean the "merit" of the claim. After consulting West's Words and Phrases, Black's Law Dictionary, California Digest's Words, Phrases Index, and Shepardizing CCP 364(b), it appears that "legal basis" connotes any legally sufficient support for a claim. A legally sufficient medical malpractice claim arguably is the same as a meritorious claim and CCP 364(b) already includes something akin to a certificate of merit.

In view of the foregoing, the staff of the Joint Committee recommends that CCP 364 be amended to consolidate the 90-day notice and certificate of merit requirements to be incorporated in a single document served by mail on the defendant and filed with the court 90 days prior to the filing of the complaint as a condition precedent to the action. In addition to the reasons given above, consolidation could: a) Dispose of unmeritorious claims at an early date; b) indicate to the defendant that the claim is a valid one and conceivably facilitate early settlement; c) insure proper compliance with the 90-day notice.

Recommendation No. 2: RECOMMEND THAT TORT SUITS BE TRIED IN TWO PARTS WITH THE FIRST PERTAINING TO LIABILITY AND THE SECOND ADDRESSING DAMAGES.

The establishment of liability is a condition precedent to presentation of evidence for damages. In the event no liability is found, the tort litigation need never progress to the damages stage. While California law permits bifurcated trials, the mechanism is seldom employed. Instead, the issues of liability, damages, appropriateness of punitive damages, and extent of injury are all simultaneously presented to the jury. By implementing a system of bifurcation, the disadvantages flowing from presenting all the above issues within one suit could be alleviated.

Where a defendant is found not liable in the first stage of a bifurcated trial, the suit is dropped and no manpower is wasted in demonstrating and litigating the issues of damages, severity of the injury, and the need for punitive damages. In view of the increasingly high litigation costs, bifurcation could represent a substantial savings.

A second benefit of bifurcated proceedings is the inherent incentive for settlement. In the unitary trial, parties may be reluctant to settle due to uncertainty about liability. In a bifurcated proceeding, if liability is ascertained, the parties may be more receptive to settlement since their positions are clarified.

The third advantage of bifurcation is the preservation of privacy. Under the prevailing system, with issues of liability

and damages, both punitive and compensatory, tried together, defendant's financial condition is in issue before the court regardless of the eventual outcome. With bifurcation, the defendant may maintain his financial privacy if not liable.

Recommendation No. 3: RAISING THE REPORTING REQUIREMENTS PURSUANT TO BUSINESS AND PROFESSIONS CODE SECTIONS 801 AND 802 FROM $3,000 TO A GREATER AMOUNT BUT NOT TO EXCEED $30,000.

Sections 801 and 802 of the Business and Professions Code require professional liability insurers, uninsured licensees or their counsel, or clerks of courts, to report to the BMQA any arbitration awards, settlements or judgments over $3,000. According to Robert Rowland, Executive Director of the Board of Medical Quality Assurance, the Board does not seek to investigate any reports unless the amount exceeds $30,000. Arbitration awards, settlement amounts, or judgments between $3,000 and $30,000 are reported to the BMQA, but no action is taken on them. Two benefits would be derived by raising the reporting requirement amounts, not to exceed $30,000. First, according to Mr. Rowland, by eliminating the $3,000 to $30,000 reports, BMQA resources could be utilized more productively. Secondly, the raising of the reporting requirement amounts could help facilitate settlements. Both plaintiff and defense attorneys indicate that physicians fear being reported to BMQA and refuse to settle for any amount larger than $2,999. Raising the reporting amount to $30,000, or some lesser amount, would enhance settlement.

Recommendation No. 4: AMEND CCP CHAPTER 2.5, SECTION 1141.10, TO PROVIDE FOR MANDATORY NON-BINDING ARBITRATION (WITH SANCTIONS--AT THE DISCRETION OF THE COURT--FOR COURT COSTS AND ATTORNEYS' FEES INCURRED FROM THE TIME OF ELECTION OF THE TRIAL DE NOVO TO BE PAID BY THE PARTY REQUESTING TRIAL BUT SUFFERING A JUDGMENT EQUAL TO OR LESS THAN THE ARBITRATION AWARD).

Under CCP Section 1141.10 (SB 1362) and within Superior Courts of a certain size, civil actions where the damages, in the opinion of the court, do not exceed $15,000 for each plaintiff must be arbitrated. The law provides for mandatory, non-binding arbitration with limited penalties attached should a party proceed to trial and not improve his position. The enacted penalties do not include attorneys' fees. Inclusion of such fees would further deter parties from pursuing a court trial and would be more fair to the opposing party who unwillingly incurred additional legal fees.

Recommendation No. 5: MEDICAL MALPRACTICE INSURANCE POLICIES SHOULD EXPRESSLY STATE WHETHER COVERAGE EXTENDS TO PUNITIVE DAMAGES.

The staff of the Committee recommends that medical professional liability insurers be required to state on the fact of their malpractice policies in bold print and express language whether the insurer will be responsible for any punitive damages assessed against an insuree in a malpractice action. Policies expressly covering punitive damages should also indicate the limits of such coverage.

Recommendation No. 6: ESTABLISH A MANDATORY COMMUNICATION SYSTEM BETWEEN THE BOARD OF MEDICAL QUALITY ASSURANCE AND HOSPITALS IN THE PROCESS OF REVIEWING PHYSICIANS' APPLICATIONS AND REAPPLICATIONS FOR STAFF PRIVILEGES WHEREBY SUCH HOSPITALS ARE INFORMED AS TO WHETHER THE APPLYING PHYSICIAN HAS BEEN REPORTED TO BMQA PURSUANT TO BUSINESS AND PROFESSIONS CODE SECTION 805. THE NATURE OF THE COMMUNICATION WOULD BE RESTRICTED TO AN AFFIRMATION AS TO WHETHER THE PHYSICIAN HAD BEEN REPORTED AND THE DATE OF THE REPORT. NO DISCUSSION OF THE CIRCUMSTANCES SURROUNDING THE REPORT TO BMQA SHALL BE EXTENDED TO THE INQUIRING HOSPITAL.

Allegations have been made by physicians serving on hospital peer review committees that a physician denied or severely restricted in his staff privileges at one hospital for negligent practices may be able to increase his privileges or apply for new privileges at other hospitals.[25] The ability of censored physicians to practice elsewhere is facilitated by the lack of communication between hospitals or physicians on various hospital staffs. It has been suggested that a physician having knowledge of another physician's negligent practices has a duty to report the negligent physician. However, unless the report is made within the course of an official proceeding, the reporting physician exposes himself

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[25]Report of the Advisory Committee Meeting on Medical Malpractice, July 19, 1978. Copy on file in Committee office.

to an action for defamation.[26] The threat of suit and the general reluctance of a physician to "snitch" on another reduce communications concerning censored physicians between staff members of hospitals.

To avoid the possibility of defamation actions and the requirement for hospital staff members to "tell" on another, the staff of the Committee recommends that the communications between hospitals be made through the Board of Medical Quality Assurance. Several problems could be circumvented and benefits derived from employing the BMQA in this manner.[27]

Pursuant to Business and Professions Code Section 805, a hospital has a duty to report negligent physicians to the Board of Medical Quality Assurance. Therefore, this recommendation does not impose any new reporting duties.[28]

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[26]Goodley v. Sullivant, (1973) 32 C.A.3d 619, 108 Cal.Rptr.451.

[27]Business and Professions Code Section 805 imposes a duty of hospitals to report physicians who have been denied or restricted staff privileges for an accumulation of 45 days in any calendar year. Consequently, pursuant to the recommendation stated above, only those censored physicians experiencing a minimum of 45 days restrictions in staff privileges would be reported to the inquiring hospital.

[28]Business and Professions Code Section 805 provides, in relevant part: "The chief administrator or executive officer of any county hospital or county medical facility or any clinic, health facility . . . shall report to the agency which issued the license when any person who holds a license . . . is denied staff privileges, removed from the medical staff or his staff privileges are restricted for a cumulative total of 45 days in any calendar year, for any disciplinary cause or reason."

Hospitals reporting to BMQA are absolutely privileged for this communication as is the BMQA in informing the inquiring hospital. Civil Code Section 43.8 provides, in relevant part:

> ". . . there shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any person on account of the communication of information in the possession of such person to any hospital, hospital medical staff . . . professional licensing board . . . when such communication is intended to aid in the evaluation of the qualifications, fitness, character, or insurability of a practitioner of the healing arts . . .[29]

Informing an inquiring hospital that a physician applying for staff privileges has experienced disciplinary action at another hospital provides proper notice to the inquiring hospital and since the communication is limited to a mere affirmation of whether the physician has been reported to BMQA, the inquiring hospital must contact the applying physician for explanation.

Recommendation No. 7: AMEND CCP SECTION 1141.10, ET SEQ (SB 1362, CHAPTER 743 LAWS OF 1978) ON ARBITRATION TO READ "NO DETERMINATION PURSUANT TO THIS SECTION SHALL BE MADE IF ALL PARTIES STIPULATE IN WRITING THAT THE AMOUNT IN CONTROVERSY EXCEEDS FIFTEEN THOUSAND DOLLARS ($15,000).

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[29]Person as defined by the Corporations Code Section 25013 includes corporations, associations, unincorporated organizations, a government or a political subdivision of a government. Employing this definition of person permits both hospitals and the Board of Medical Quality Assurance to be absolutely privileged in accordance with Section 43.8 of the Civil Code.

SB 1362, as enacted, states in part:

> 1141.11(a). In each superior court with 10 or more judges, all at-issue civil actions pending on or filed after the operative date of this chapter shall be submitted to arbitration, by the presiding judge or the judge designated, under this chapter if the amount in controversy in the opinion of the court will not exceed fifteen thousand dollars ($15,000) for each plaintiff, which decision shall not be appealable. (Emphasis added).
>
> 1141.16(a). The determination of the amount in controversy . . . shall be made by the court and the case submitted to arbitration . . . No determination pursuant to this Section shall be made if all defendants stipulate in writing that the amount in controversy exceeds fifteen thousand dollars ($15,000). (Emphasis added).
>
> 1141.16(b). The determination of the amount in controversy shall be without prejudice to any finding on the value of the case by an arbitrator or in a subsequent trial de novo.

In its present form, the law favors defendants in their ability to avoid arbitration. Since determination of the amount in controversy is "without prejudice," there is no deterrent for defense counsel who elects to avoid arbitration. In those jurisdictions where juries favor defendants, it is to the defense's advantage to directly pursue a court trial. Such unilateral avoidance obviates the intent of the law. Therefore, the staff of the Committee recommends amending CCP Section 1141.16 to provide that no determination of the amount in controversy shall occur if all parties stipulate in writing that the amount is in excess of $15,000.

Recommendation No. 8: ESTABLISH A PATIENTS' COMPENSATION FUND COUPLED WITH A LIMITATION OF LIABILITY FOR PARTICIPATING HEALTH CARE PROVIDERS TO $100,000 PER OCCURRENCE AND $300,000 PER ANNUAL AGGREGATE.

Pursuant to this recommendation, health care providers practicing within California may participate in the Patients' Compensation Fund and thereby limit malpractice liability. Health care practitioners choosing to participate must: 1) show proof of financial responsibility either through health care insurance in the amounts of at least $100,000 per claim and $300,000 per year or by annually posting cash or a surety bond in these prescribed amounts, and 2) pay a fund surcharge in an amount not to exceed 10% of the annual premium for health care insurance or approximately $100, whichever is greater. (The exact amounts would have to be calculated by the Commissioner of Insurance.)

A patients' compensation fund is not to be confused with the physicians' liability fund proposed in 1976 (AB 2939). Assemblyman Howard Berman's bill provided for the establishment of a fund from which plaintiffs' medical malpractice awards would be paid. The fund was predicated upon the concept that physicians practicing in California could contribute a designated sum to a central fund, making available monies to deserving malpractice plaintiffs. The distinction between the physicians' liability fund and the patients' compensation fund recommended herein is that the former proposed that the total malpractice judgment in excess of a possible $2,000 deductible would be paid out of the fund. Under the patients' compensation fund, the participating health care provider is responsible for the first $100,000, with the excess recovery up to $500,000 per defendant member to be paid by the patients' compensation fund.

Variations on a patients' compensation fund coupled with a liability limitation have withstood constitutional challenges in several states including Pennsylvania, Wisconsin, Indiana, Nebraska, Florida and New Mexico.

In Florida, participation in the patients' compensation fund is mandatory for hospitals, but voluntary for physicians. Regardless of their specialty or part of the state they practice in, physicians who participate are required to pay $1000 initially and $500 in subsequent annual payments. Participation in the fund entitles contributors to limit their liabilities to $100,000 per medical malpractice action. Enacted in 1975, the Florida legislation has survived many constitutional challenges. Nebraska and Wisconsin also have laws providing for voluntary participation in a patients' compensation fund coupled with a limitation on liabilities for contributing health care providers. Recently, Nebraska's Supreme Court upheld a provision requiring contributors to the fund to demonstrate financial responsibility on the grounds that the requirement was quid pro quo for the advantage afforded by a limitation on the physician's damages.

The relevant texts of Pennsylvania's, Wisconsin's and Indiana's existing law appear below for your study. All three have survived constitutional attacks.

A. Pennsylvania. Article VII, Medical Professional Liability Catastrophe Loss Fund, Section 1301.701 states in pertinent part:

> "(a) Every health care provider as defined in this act, practicing medicine or podiatry or otherwise providing health care services in the Commonwealth shall insure his professional liability or provide proof of self-insurance in accordance with this section.

(1) A health care provider, other than hospitals, who conducts more than 50% of his health care business or practice within the Commonwealth of Pennsylvania shall insure or self-insure his professional liability in the amount of $100,000 per occurrence and $300,000 per annual aggregate, and hospitals located in the Commonwealth shall insure or self-insure their professional liability in the amount of $100,000 per occurrence, and $1,000,000 per annual aggregate, hereinafter known as 'basic coverage insurance' and they shall be entitled to participate in the fund.

(b) No insurer providing professional liability insurance shall be liable for payment of any claim against a health care provider for any loss or damages awarded in a professional liability action in excess of $100,000 per occurrence and $300,000 per annual aggregate for each health care provider against whom an award is made unless the health care provider's professional liability policy or self-insurance plan provides for a higher annual aggregate limit.

(e) The fund shall be funded by the levying of an annual surcharge on all health care providers except as provided for in subsection (a)(2). The surcharge shall be determined by the director appointed pursuant to section 702 based upon actuarial principles and subject to the prior approval of the commissioner. The surcharge shall not exceed 10% of the cost to each health care provider for maintenance of professional liability insurance or $100, whichever is greater. Health care providers having approved self-insurance plans shall be surcharged an amount equal to the surcharge imposed on a health care provider of like class, size, risk and kind as determined by the director. The fund and all income from the fund shall be held in trust, deposited in a segregated account, invested and reinvested by the director, and shall not become a part of the General Fund of the Commonwealth. If the total fund exceeds the sum of $15,000,000 at the end of any calendar year after the payment of all claims and expenses, including the expenses of operation of the office of the director, the director shall reduce the surcharge provided in this section in order to maintain the fund at an approximate level of $15,000,000. All claims shall be computed on December 31 of the year in which the claim becomes final. All such claims shall be paid within two weeks thereafter. If the fund would be exhausted by the payment in full of all claims allowed during any calendar year, then the amount paid to each claimant shall be prorated. Any amounts due and unpaid shall be paid in the following calendar year. The annual surcharge on health care providers and any income realized

by investment or reinvestment shall constitute the sole and exclusive sources of funding for the fund. No claims or expenses against the fund shall be deemed to constitute a debt of the Commonwealth or a charge against the General Fund of the Commonwealth. The director shall issue rules and regulations consistent with this section regarding the establishment and operation of the fund including all procedures and the levying, payment and collection of the surcharges. A fee shall be charged by the catastrophe loss fund director to all self-insurers for examination and approval of their plans."

B. Wisconsin. Subchapter III, Insurance Provisions, Section 655.23, states in pertinent part:

"(1) All health care providers permanently practicing or operating in this state shall pay the yearly assessment into the patients' compensation fund under section 655.27.

(2) Every health care provider permanently practicing or operating in this state shall, once in each year as prescribed by the commissioner, file with the commissioner in a form prescribed by the commissioner, proof of financial responsibility as provided in this section. No health care provider who retires or ceases operation after the effective date of this act (1975) shall be eligible for the protection provided under this chapter unless proof of financial responsibility for all claims arising out of acts of malpractice occurring after the effective date of this act (1975) is provided to the commissioner as required in this section.

(4) Such health care liability insurance or cash or surety bond shall be in amounts of at least $100,000 per claim and $300,000 per year.

(5) While such health care liability insurance, self-insurance or cash or surety bond approved by the commissioner remains in force, the health care provider, the provider's estate and those conducting the provider's business, including the provider's health care liability insurance carrier, are liable for malpractice for no more than $200,000 per claim and $600,000 per year or the maximum liability limit for which the provider is insured, whichever is higher, if the health care provider has met the requirements of this chapter."

C. Indiana. Overview of Indiana Public Law 146 states:

"The referenced law allows a health care provider (as defined in the Act) to limit his/her/its liability for any act of medical malpractice to $100,000 upon the occasion of the health care provider having (1) filed evidence of insurance with the Department of Insurance each year in the minimum amounts prescribed and (2) paying a fee, known as a surcharge, in an amount equal to 10% of the annual premium for the insurance of the health care provider. The Act does not require any health care provider to 'qualify' under the Act by performing the two above-mentioned actions but rather simply allows a health care provider to limit liability to $100,000 if the two above actions are met.

If a health care provider has filed the insurance evidence and paid the surcharge as prescribed above, any patient being injured by such health care provider is limited to a recovery for damages not to exceed $500,000 total. First an amount of money is to be paid by each health care provider to a maximum of $100,000 and if that amount so collected is not sufficient to pay the total damages awarded or agreed to, the balance up to the maximum of $500,000 will be paid to the patient-claimant from the Patients Compensation Fund. The Patients Compensation Fund is funded by the 10% 'surcharge' referred to previously. If for example there are three (3) health care providers involved in committing the malpractice act and if each were to be adjudged liable to the extent of $100,000 each for a total of $300,000 and if the patient were awarded a total of $500,000, then the additional $200,000 would come from the Patients Compensation Fund.

The amount of insurance which must be carried by a health care provider in order to have liability limited to $100,000 is $100,000 for each occurrence of medical malpractice with a maximum annual aggregate of insurance in the amount of $300,000 for all health care providers except a hospital. A hospital, as defined in the Act, must file evidences of insurance affording $100,000 for each occurrence of medical malpractice with an annual aggregate of $2,000,000 if the hospital has 100 beds or less. For hospitals with more than 100 beds, the insurance evidence must be $100,000 for each occurrence with an annual aggregate amount of $3,000,000. Health care providers, other than hospitals, can gain the limited liability offered

by the Act without filing evidence of insurance if they will deposit with the Commissioner of Insurance either (1) cash in the amount of $300,000, or (2) a surety bond in the amount of $300,000 for each year. A hospital can become "qualified" under the Act without furnishing evidences of insurance by filing a financial statement with the Commissioner of Insurance which demonstrates sufficient assets to fulfill its obligations under the Act to the extent of $2,000,000 or $3,000,000 depending upon the numbers of beds . . ."

EXHIBIT A

78-356

MALPRACTICE - SECTIONS 801, 802, 803
REPORTS RECEIVED AND INVESTIGATIONS OPENED
1976, 1977 AND JANUARY - JUNE 1978

Dollar Amount	Number of Reports Received			Number Sent to Investigations		
	1976	1977	Jan-June 1978	1976	1977	Jan-June 1978
3,000 - 4,999	73	35	18	0	0	0
5,000 - 9,999	156	118	65	0	0	0
10,000 - 14,999	122	91	52	0	0	0
15,000 - 19,999	85	70	24	0	0	0
20,000 - 24,999	53	41	22	0	0	1
25,000 - 29,999	54	70	21	1	4	6
30,000 +	230	266	126	N/A	266*	123**
TOTAL	773	691	328	N/A	270*	130**

N/A indicates the data is not available

* Includes 37 investigations of cumulative totals of more than $30,000
** Includes 03 investigations of cumulative totals of more than $30,000

Bureau of Medical Statistics
October 12, 1978

78-357

PROCEDURAL REFORM

PROCEDURAL REFORM

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(NOTE: All page numbers of Report begin with 78-358, 78-359, etc.)

TABLE OF AUTHORITIES

INTRODUCTION

With limited space and time, the staff of the Joint Committee attempts to highlight some significant problems and offer some solutions in the area of procedural reform. Like tort law, procedure is ever changing and demands constant reform.

What follows is a discussion of reports submitted to the staff, review of judicial decisions and recommendations which hopefully can improve our procedural system. Our 1979 report will include additional procedural recommendations.

The staff wishes to thank Professors John Fleming and Gary Schwartz for their thoughtful contributions.

I

REVIEW OF PROFESSOR SCHWARTZ' "REPORT TO THE JOINT COMMITTEE ON TORT LIABILITY"[1]

It is to be noted preliminarily that Professor Schwartz' recommendations concerning tort liability are to be viewed from a perspective of the underlying purposes of tort law. Professor Schwartz indicates these purposes are four: 1) deterrence; 2) compensation; 3) fairness, and 4) minimization of administrative cost.

II

RECOMMENDATION 2 - ARBITRATION

With the passage of Senator Smith's bill (Cal. Stats. 1978, Ch. 743, CCP Sec. 1141.10, et seq.), the issue of using arbitration

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[1]Schwartz, Gary, "Report to the Joint Committee on Tort Liability," Jan. 19, 1978 (unpublished report on file with the Committee).

for small cases is moot. That bill provides for: 1) mandatory arbitration where the amount in controversy is more than $15,000, or upon stipulation of parties regardless of the amount in controversy; 2) trial de novo with jury on election of either party but, if the result of the trial de novo is not more favorable, then costs of subsequent litigation will be shifted to the electing party; 3) provisions to be formulated by the Judicial Council regarding practice and procedure for all actions submitted to arbitration under the bill. The remaining issue of the arbitration legislation is its constitutionality. As Professor Schwartz explains, mandatory binding arbitration would be violative of the constitutional right to a jury trial if it closes the courts to litigants and is the final determination of the rights of the parties.[2] However, in a Pennsylvania decision appealed to the U. S. Supreme Court and dismissed, it was held that the right to trial by jury is not violated by a compulsory arbitration statute having a condition for the allowance of an appeal from the award of arbitrators, payment of accrued costs and the giving of a recognizance for the payment of costs to accrue in the appealed proceeding.[3]

The rationale in Smith for upholding the constitutionality of the provision was that the right to jury trial was not burdened

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[2]cf., Brooks v. Small Claims Court, (1973) 8 Cal.3d 661; Prudential Insurance Company v. Small Claims Court, (1916) 76 Cal. App. 2d 379, relying on Capital Traction Company v. Hof., (1899) 174 U.S. 1 (directly under 7th Amendment of U.S. Constitution).

[3]Application of Smith, (1955) 381 Pa. 223, 112 A.2d 625, 55 A.L.R. 2d 420, appeal dismissed 350 U.S. 858, 76 S.Ct. 105.

by "onerous conditions, restriction, or regulations" which would make that right practically unavailable (Id. at 226). The California statute imposing mandatory arbitration and that upheld in Pennsylvania are substantially the same insofar as the conditions imposed upon it for a jury trial.[4] Furthermore, the Pennsylvania constitutional provision, Article 1, Section 6, is similar to that provided by Article 1, Section 16, of the California Constitution. Thus, it appears that the California provision should be upheld.

Professor Schwartz recommends as an alternative that the arbitrators' factual findings could be admissible as evidence in the de novo trial as a kind of expert testimony.

An alternative recommendation is to make the imposition of costs on the electing party discretionary based on that party's financial ability and good faith. To the extent that the constitutionality depends on making the right to jury trial practically available, this alternative appears to avoid challenge. At the same time it furthers the fundamental purpose of arbitration, that is, avoidance of delay and relief of court congestion. It also serves the purposes of tort law set forth by Professor Schwartz by deterring wrongful conduct, compensating the wronged party, ensuring fairness by not imposing costs of relitigation on one in whose favor both judgments were rendered and by avoiding relitigation and increased administrative costs.

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[4]Compare, Cal. Stats. 1978, Ch. 743, §2 at 1323 and 5 Penn. Stats. Ann. §§71-72.

III

NOTICE OF SUIT

Under existing law, a potential lag between plaintiff's filing a complaint and defendant's notice thereof may result from the statutory procedure which allows service of summons and complaint up to three years after the original filing. The effect of this lag is to create what is commonly called "long tails," meaning that a defendant must wait out four years to know if he may be held liable (assuming the statute of limitations on the underlying cause of action is one year). Insurance companies claim this creates havoc with their reserves resulting in high premiums.

Professor Schwartz is critical of a procedure to mail notice of suit to defendant within two weeks after the suit is filed. The criticism apparently stems from two concerns: 1) it would create another burdensome procedure for the filing of a lawsuit, and 2) defendants might be induced to flee California to avoid process and escape jurisdiction. Professor Schwartz recommends following the federal model in the Federal Rules of Civil Procedure, Rule No. 4(a): "Upon filing of a complaint, the clerk shall 'forthwith' issue a summons and deliver it for service by the marshal."

A third option would be to require the notice of suit prior to the filing of a complaint. Such notice might also include a declaration of merit. Under Code of Civil Procedure Section 364, such notices are already required in actions against health care providers. The apparent purpose of the notice is to strengthen

claims settlement, decongest the courts and eliminate defense costs. By the filing of the notice as a condition precedent to filing suit, Professor Schwartz' first concern, the burden of additional procedures, could be offset by the advantage of decongesting the courts due to early settlements of cases. That a defendant may try to escape jurisdiction, Professor Schwartz' other concern, it is this staff's opinion that, as a practical matter, this would occur only rarely. As pointed out by Robert A. Leflar, with the enactment of long-arm statutes, even extra-territorial jurisdiction is no longer a problem. Thus, the notice as a condition precedent to suit appears to be a viable and advantageous alternative.

If Code of Civil Procedure Section 364 were to be used as a model, that enactment of the notice across the board should be delayed until data as to the effectiveness of Section 364 is accumulated. The Joint Committee is presently accumulating such data, but further experience through lapse of time is needed. Another effect of requiring a general 90-day notice procedure is the present challenge to CCP Section 364 on grounds of denial of equal protection.[5]

IV

PROCEDURE FOR SHIFTING COSTS

Professor Schwartz describes the procedure available to

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[5]See, Younger v. Kinder, (1977), Denial of Petition for Writ of Mandamus, No. L.A. 30785; remanded to Court of Appeal, (2nd Dist.) No. 51239.

cull out frivolous tort claims: 1) demurrer, 2) summary judgment, and 3) pre-trial settlement conference. There is also a procedure for partial summary judgment. As pointed out by Justice Robert S. Thompson, Second District Court of Appeal, the availability of this partial summary judgment procedure is often overlooked and it should be used more frequently.

In the opinion of Professor Schwartz, given the procedures available, the need for an additional method of eliminating frivolous suits has not been adequately established. He sees little merit in a pre-trial, cost-shifting procedure, but does believe that a post-trial shifting of full costs might be appropriate in view of the hindsight perspective gained by the Court. There is precedent for this in workers' compensation (see, Labor Code, Section 5814).

There is more direct authority on point as found in Code of Civil Procedure Section 998. That section allows a party to make a settlement offer. If such offer goes unaccepted and the jury returns a verdict in the amount of the offer or less, the refusing party must bear the offeror's cost of litigation from the time of the offer. In addition, the California Code of Civil Procedure provides for the implementation of pre-trial conferences in civil actions and California Rules of Court, Rule 208, provides that pre-trial conferences are only required where requested by one of the parties.

As an alternative recommendation, it is suggested that the Code of Civil Procedure and the California Rules of Court be amended to require settlement conferences be made mandatory in every case where the amount in controversy exceeds $15,000. As part of the proceeding, a confidential settlement conference order should issue indicating defendant's offer, plaintiff's refusal and counteroffer, if any, and the court's evaluation. If the case thereafter is tried with a verdict returned for the offered or counter offered amount, or less, the court should then be able sua sponte to invoke the provisions of CCP Section 998 imposing full costs against the refusing party. Such an amendment would encourage settlement of claims and fulfill the purpose of fairness mentioned by Professor Schwartz.

Another approach to eliminating frivolous suits is an action for malicious prosecution which lies in tort for the institution of unjustifiable civil judicial proceedings (3 Witkin, California Procedure, 2246, 2d Ed., 1971). The elements of the cause of action are: 1) institution of the proceeding; 2) lack of probable cause, that is lack of honest and reasonable belief in the likelihood of a successful suit; 3) malice which is actual ill will or other improper motive, and 4) favorable termination of the proceeding (Id. at 2247).

As pointed out in Jaffe v. Stone, 18 Cal. 2d 159, the plaintiff's burden of proving a cause of action for malicious prosecution is difficult but, according to the opinion:

> "We should not be led so astray by the notion of a 'disfavored' action as to defeat the established rights of the plaintiff by indirection; for example, by inventing new limitations on the substantive right, which are without support in principle or authority or by adopting stricter requirements of pleading than are warranted by the general rules of pleading." (Jaffe v. Stone, supra. at 159).

Growing acceptance of this view is exemplified by an increase in the number of successful countersuits. In a special report entitled, "The First Countersuit Money Changes Hands," Medical Economics, August 7, 1978, the burdens and difficulties of the suit are underscored: the time from bringing of the original action to the judgment in the malpractice prosecution action was lengthy (1973-1978); the expenses in defending the first suit and in prosecuting the second were high, and the personal cost to the defendant was great.

Presently, the cause of action is based entirely on case authority. Apparently this authority is becoming more favorable to plaintiffs (see, Jaffe v. Stone, supra.). Whether the action needs to be legislatively adopted may be questionable. It is staffs' opinion that if the action were to be legislatively adopted, proof of malice should be eliminated with the principle measure of liability being lack of probable cause.

V

BIFURCATING TORT TRIALS

If in his discretion a bifurcation will "promote the convenience of witnesses or ends of justice," a judge may, sua sponte or at request of either party, bifurcate a trial into liability and damage portions (Code of Civil Procedure Section 598). The purpose

of allowing the trial of liability before damages is to avoid a waste of time and money and to simplify the presentation of evidence.[6] As Professor Schwartz points out, there are two major arguments on behalf of bifurcation: 1) it will save time (he notes a study by University of Chicago researchers concluding that the net saving of court time under bifurcation is 20%--a substantial figure), and 2) prevention of jury being swayed by evidence irrelevant to the issue of liability.

According to Professor Schwartz, the effect of bifurcation, while procedural in form, has a substantive "pro-defendant" implication: juries no longer will be swayed on the issue of liability by the enormity of harm sustained by a plaintiff.

Schwartz thinks highly of the recommendation to make bifurcation the rule as does Justice Robert S. Thompson.[7] It is staffs' recommendation that Code of Civil Procedure Section 598 be amended to provide that in civil jury cases, the issue of liability be tried first and, if liability is determined, the issue of damages shall be subsequently litigated. However, in the court's discretion upon a showing of inconvenience to witnesses or where the ends of justice demand, a single trial may be had.

VI

APPOINTMENT OF EXPERTS

Each party may hire and offer the testimony of an expert witness and is primarily responsible for the payment of his expert.

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[6] Foreman and Clark Corp. v. Fallon, (1971) 3 Cal. 3d 885; Trickey v. Superior Court, (1967) 252 Cal. App. 2d 650.

[7] See, Minutes, Government Advisory Committee Meeting, 7/31/78, on file with Committee.

As pointed out in the Model Code of Evidence of 1942, the problem with using this system of expert witnesses, a "hired-gun" approach so-to-speak, is the distrust which the testimony generates since it comes from a biased source. Professor Schwartz points out the advantage of court appointed experts is the help to the triers of fact making informed decisions.

There are two methods of using court appointed witnesses. The first is to allow the court after notice and motion sua sponte to appoint its independent expert. If the parties can stipulate upon an expert, the court shall have no discretion to appoint other than the expert so stipulated; if the parties cannot reach an agreement, then the court will appoint an expert of its own choosing. In either case, no other expert shall be allowed to testify.

The second alternative, the one adopted by the Uniform Rules of Evidence of 1975, by the Model Code of Evidence of 1942, and by the Model Expert Testimony Act of 1936, is basically the same but allows the parties to select and call expert witnesses of their choosing with disclosure to the jury of the court appointed expert. The distrust, if any, generated by testimony of the parties' experts is greatly lessened by the jury's probable belief that experts selected by the judge will be impartial and if two experts agree, a conflicting opinion will be discounted.

There are also two methods of compensating the court appointed expert. The first is payment through public sources. Professor Schwartz points out that a system of court appointed independent

experts paid with public funds could induce the filing of marginal claims since the public bears the financial obligation for the expert, a potential litigant is without significant economic pressure. This alternative has the further disadvantage of placing a burden on already limited public resources.

A second method of compensating the court appointed expert is similar to that prescribed for the payment of jury fees under Code of Civil Procedure Sections 631 and 1032.5: the party requesting the expert is required to deposit the initial fee; if no party requests such an expert, then the court may allocate the fee in equal amounts according to the number of parties or in its discretion and according to who has the burden of proof may impose on one party the entire amount. On conclusion of the trial, the prevailing party in a civil action, including a defendant in favor of whom the action is dismissed, is entitled to the amounts advanced for payment of the court appointed expert.

To discourage the use of experts not appointed by the court, sums paid for fees for partisan experts should not be taxed as costs.

The Joint Committee on Tort Liability recommends acceptance of the second alternative for appointment and compensation of experts.

VII

PERIODIC PAYMENTS

The general rule is that judgments are to be satisfied by lump sum payments. Exceptions to this rule are found in the workers'

compensation cases, suits for medical malpractice and government liability.[8]

Professor Schwartz points to the increasing practice of compromise and releases which resolve a disputed workers' compensation claim by lump sum payment. He believes that the experience under workers' compensation is moving away from periodic payments, however, his report cites no authority for this proposition.

Since the enactment of AB 1XX in 1975, periodic payments have been authorized in medical malpractice cases. The experience under AB 1XX is limited. (The Joint Committee on Tort Liability is presently accumulating data on the effectiveness of AB 1XX; see, e.g. Report of the Joint Committee on Tort Liability: Medical Malpractice, Jan. 1979). Other states have had a greater experience with which to judge the effectiveness of this device. A publication entitled "State Health Legislation Report,"[9] explains the value of periodic payments:

> ". . . In most states judgments can only be rendered in lump sum awards. This type of payment is often ill-suited in cases where awards include payment for anticipated future medical care, lost earnings, pain and suffering. This is because of the speculation involved as to the amounts actually needed in the future. Under a periodic payments system, the payments are made over the actual life of the plaintiff or for the period of disability. Thus, under this system, funds are available for the purpose for which they were intended and there is no windfall to the beneficiaries of a plaintiff who dies sooner

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[8] See, Code of Civil Procedure §667.7; Government Code §970.6.

[9] "State Health Legislation Report," Vol. 5, No. 1, May 1977, Legislative Department, Public Affairs Division of the American Medical Association.

than expected. Also, all insurers can fund periodic payments at substantially less cost than an equivalent lump sum payment."

Professor Schwartz argues that periodic payments will reduce the cost of tort liability insurance "only if there is a discrepancy between the 'true' interest rate that the insurer is able to avail itself of in making appropriate investments and the 'legal' interest rate which the courts rely on in discounting future losses to present value." This statement does not consider how the undiscounted value of the future loss is computed. Presently the California courts allow a per diem argument to the jury concerning pain and suffering. The very permissibility of such an argument underscores the speculative nature of the computation of future losses which the periodic payments device seeks to prevent.

It is the opinion of staff, at the request of either party and in the discretion of the court, that periodic payments allowed in Code of Civil Procedure Section 667.7 should be allowed in all cases involving payments of future damages.

In the field of medical malpractice, despite passage of AB 1XX,[10] insurance premiums have not lessened according to insurers because of equal protection challenges to its validity. By enacting a general provision for periodic payments, this basis for challenge should be vitiated.

VIII

STANDARDS FOR PAIN AND SUFFERING AWARDS

According to Professor Schwartz, two-thirds of the typical

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[10]Chap. 1, Stats. of 1975.

tort award goes for pain and suffering. He further points out that leading scholars of tort law are skeptical of the validity of substantial pain and suffering awards.

His thorough discussion of this subject emphasizes the need for legislative reform:

1. Pain and suffering damages do not serve the compensation purpose of tort law, i.e., reimbursing that which the victim has expended;

2. Standards should be established for determination of pain and suffering damages in individual cases. Unfairness, contrary to basic tort law, results when verdicts treat basically equal litigants in an unequal way;

3. Disagreements between plaintiff and defense counsel on the amount of the pain and suffering award thwarts settlements and is contrary to efficient judicial administration.

In view of these considerations, the staff of the Joint Committee on Tort Liability, in accord with Professor Schwartz, recommends that a limitation on pain and suffering damages be set by the Legislature.

IX

PUNITIVE DAMAGES

Professor Schwartz addresses three questions concerning punitive damages: 1) Should punitive damages ever be available; 2) if available, in what category of cases should they be allowed, and 3) in cases where they are allowed, what standards should be used for determining the amount?

Unfortunately, Professor Schwartz does not answer these questions, but states: "only if punitive damages are limited to rare cases can their availability in tort be justified at all."

Punitive damages are recoverable in tort cases where defendant has been guilty of oppression, fraud, or malice (California Civil Code §3290). This provision has long been held constitutional.[11] Recently, however, the Supreme Court granted a petition for hearing in the case of Egan v. Mutual of Omaha, (1976) 133 Cal. Rptr. 899. An award for punitive damages has been challenged on the ground that the standards of oppression, fraud and malice are unconstitutionally vague. The Supreme Court may decide that punitive damages are not available under existing standards. In the event that Civil Code Section 3290 is determined to be constitutional, the next question is, in what kinds of cases should they be available? The answer to this question depends upon the function sought to be achieved since their application should be restricted thereto.

In the Law of Torts, 4th Ed., (1971) at page 11, Dean Prosser comments that the purpose of punitive damages has been the subject of much controversy. Those favoring punitive damages argue they are a method of discouraging evil motives while those against point to their penal nature and the windfall resulting to the plaintiff. A recent case, Grimshaw v. Ford Motor Co., tried in the Orange County Superior Court, is helpful since it involves a very large

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[11] See, Tool v. Richardson-Merrell, (1967, 251 Cal. App. 2d 689; Fletcher v. Western Nat. Life Ins. Co., (1970) 10 Cal. App. 3d 376.

verdict, $127.5 million, based upon the manufacturer's callous disregard for consumer safety. Punitive damages attempt to deter subsequent conduct of this nature by making the risk of high judgments exceed the cost of complying with safety standards. In the Product Liability Advisory Committee Transcript of Hearing, Sept. 15, 1978, a letter from Ford Motor Company addressed to the National Highway Traffic Safety Administration, dated 9/19/73 was read. As the following quote from that transcript points out, in order to serve a deterrent function, punitive damages must be substantial where defendants with substantial assets are involved:

> "Ford recognizes the Administration's desire to eliminate any unreasonable risk of death or injury to the motoring public. We concur in this goal and believe that fuel system integrity is a proper subject to address in accomplishing this aim. However, the vehicle changes required to meet the criteria of this standard must be weighed against: 1) the cost of modifications to meet the criteria, and 2) the benefits to be derived from avoiding such deaths and injuries as now actually result from the kinds of fires that the amended standard could be expected to prevent."

The letter further states:

> "The cost of implementing the roll-over portion of the amended standard has been calculated to be almost three times the expected benefit, even using very favorable benefit assumptions. The yearly benefits of compliance are estimated at just under $50 million, with an associated cost to consumers of $137 million . . ."

The cost to Ford Motor Company, i.e., the cost to consumers, was related to the benefits of modifying Ford Pinto automobiles so they wouldn't incinerate the occupants as the result of rear end collisions.

> "The benefits: it's a savings of 180 burn deaths, 180 serious burn injuries, 2100 burned vehicles. The Ford Motor Company

estimates the unit cost at $200,000 per death, $67,000 per injury, and $700,000 per vehicle."

It appears that Ford decided that the cost of complying with safety standards outweighed the cost in human lives and the potential exposure to punitive damages.

The second and third questions are interrelated here because if it is determined that punitives should be allowed in cases involving callous or reckless disregard for the safety of others, the deterrent function can only be served if they impose some hardship on the defendant. Thus when the judge remitted the judgment in the Ford Pinto case to $7 million, there was little or no deterrent impact since the cost to Ford of changing the design was much greater than paying the judgment.

If deterrent can be served by punitive damages, the standard by which to measure the amount of the damages should be a correlative of the defendant's wealth.

However, it is the opinion of staff that punitive damages should not be allowed, but that penal sanctions be imposed where the conduct shows such reckless disregard, malice or oppression as would previously have warranted punitives under Civil Code Section 3290. The basis for this opinion is that presently the deterrent function of punitives is served only in a haphazard fashion. By alleging punitives, a plaintiff may be able to have admitted evidence of defendant's wealth which may adversely influence the jury on the issue of compensatory damages. More control over and even-handedness of administration of justice would result

since penal sanctions could be uniformly applied as opposed to a defendant's liability for punitives depending upon the willingness of a victim to sue in tort.

X

THE DOCTRINE OF COMPARATIVE FAULT

A. Li and the Comparative Fault System.

1. Existing Law. Previously California followed the rule of contributory negligence. Contributory negligence is conduct on the part of the plaintiff which falls below the standard of care to which he should conform for his own protection and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm (Restatement, 2nd, Torts, §463). Prior to Li v. Yellow Cab Co., (1975) 13 Cal. 3d 804, contributory negligence was held to have been required by Civil Code §1714 which provides:

> "Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the tital on compensatory relief."

The rule of contributory negligence was rooted in the longstanding principle that one should not recover from another for damages brought upon oneself (Buckley v. Chadwick, 1955, 45 Cal. 2d 183). Since the decision in Li, supra, the all-or-nothing rule of contributory negligence was superceded by a system of pure comparative negligence. Under the latter system, in all actions for negligence resulting in injury to person or property, the

contributory negligence of the person injured shall not bar recovery, but the damages awarded shall be diminished in proportion to the amount of negligence[12] attributable to the person recovering (Li v. Yellow Cab Co., supra. at 829).

The adoption of the doctrine of comparative negligence was based on the "clear and constant" criticism that the rule of contributory negligence worked harsh and inequitable results. As stated by Dean Prosser: "it [the rule] places upon one party the entire burden of a loss for which two are, by hypothesis, responsible" (Prosser, Torts Fourth Ed., 1971, Section 67, p. 433). Harper and James express the same basic idea:

> "There is no justification--in either policy or doctrine--for the rule of contributory negligence except for the feeling that if one man is to be held liable because of his fault, then the fault of him who seeks to enforce that liability should also be considered. But this notion does not require the all-or-nothing rule, which would exonerate a very negligent defendant for even the slight fault of his victim. The logical corollary of the fault principle would be a rule of comparative or proportional negligence, not the present rule (of contributory negligence)" (2 Harper and James, The Law of Torts, [1956] Section 22.3 at 1207).

The staff of the Joint Committee on Tort Liability also concludes that the harsh rule of contributory negligence should be legislatively abrogated and that comparative negligence should be codified by amendment to Civil Code Section 1714 as follows:

> "Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so

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[12] The "negligence" language is a modification from the first opinion which read "fault."

far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.

In such cases, nothing in this section shall be construed so as to bar recovery and the extent of liability is defined by the tital on compensatory relief."

The following sections should be added to Title 2, Chapter 1, Sections 3281, 82 and 83 of the California Civil Code:

"In an action based on fault to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the plaintiff diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the plaintiff's contributory fault, but does not bar recovery. This rule applies whether or not the plaintiff's contributory fault heretofore constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

'Fault' includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of casual relation apply both to fault as the basis for liability and to contributory fault."

The Joint Committee on Tort Liability believes the effect of such amendment would be to legislatively implement the system of pure comparative fault which would apply to all tort actions.

2. Pure Versus Other Comparative Systems. In Li v. Yellow Cab Co., supra., the Court adopted a system of pure comparative negligence. Under such a system, plaintiff's recovery is never barred by his contributory fault; it is merely reduced proportionately.

Other comparative systems allow plaintiff's recovery only if his contributory fault was: 1) slight in comparison with the negligence of defendant, or 2) as long as it was not as great as that of defendant, or 3) as long as it was not greater than that of defendant. Under these systems, the bar of contributory negligence would still apply in some situations.

It is the opinion of the staff of the Joint Committee that the pure system avoids harsh results. Moreover, as the Court points out in Li v. Yellow Cab, supra., the partial comparative systems distort the very principle they recognize, i.e., that persons are responsible for their acts to the extent their fault contributes to an injurious result.

B. Defenses to the Doctrine. Prior to the judicial adoption of comparative negligence, there existed several doctrines which were but variant categories of contributory negligence and methods of avoiding the harsh consequences thereof. These doctrines are analyzed below, together with recommendations as to how they should be treated in the comparative fault system.

1. Last Clear Chance. The doctrine of last clear chance had its origin in England prior to its adoption of comparative negligence in 1945. In Davis v. Mann, (1842) 15 2 Eng. Rep. 588, the plaintiff left his ass fettered in the highway and the defendant drove into it. Although he obviously didn't take reasonable care, plaintiff was allowed to recover because defendant had the last clear chance to avoid the injury. Hence, the nickname of the "Jackass doctrine," with whatever implications that may carry (Prosser, Law of Torts, 4th Ed., [1971] 66 at 427). In substance,

the doctrine provides that a plaintiff might recover, notwithstanding any negligence of his own, if the defendant had the last clear chance to avoid the accident. As the Court in Li v. Yellow Cab Co., supra., points out, the doctrine of last clear chance was a palliative to avoid the harsh bar of contributory negligence.

The Joint Committee staff agrees that with the adoption of comparative fault principles, the need for the doctrine of last clear chance disappears. Thus, it is our recommendation that the doctrine should be abandoned.

2. Violation of Safety Statutes. California law provides that violation of a statute which seeks to protect a class of individuals against particular conduct creates a presumption of negligence (Evidence Code Section 669, Satterlee v. Orange Glenn School District, [1947] 29 Cal. 2d 581). The doctrine applies against a plaintiff as well as a defendant. The effect of the presumption is to satisfy the burden of proving a party's negligence and shifting the burden to the adversary to disprove it if he can.

Since the doctrine of neglience per se is not inconsistent with the substantive law of comparative fault, staff recommends against any modification of such doctrine.

3. Res Ipsa Loquitor. Res Ipsa Loquitor is an evidentiary concept whereby negligence is proved. The traditional elements of the doctrine are:

a. The event causing injury must be of a kind which ordinarily does not occur in the absence of someone's negligence;

b. It must be caused by an agency or instrumentality within the exclusive control of the defendant;

c. It must not have been due to any voluntary action or contribution on the part of the plaintiff (4 Wigmore, Evidence, 1st Ed., 1905, Section 2509).

With the adoption of comparative negligence, a question arises as to whether the third element of the doctrine is separate and substantive requirement or merely a restatement of the independent requirement that plaintiff be free of contributory negligence. This issue was involved in Turk v. H. C. Prange Co., (1963) 119 N.W. 2d 365, after Wisconsin's adoption of comparative negligence. It was therein decided that the third element was but a restatement of the requirement under prior law that plaintiff be free from contributory negligence. The Court stated that if defendant is found negligent, plaintiff's contributory negligence now goes to the question of comparison of negligence between plaintiff and defendant (Id. at 371-72).

The staff of the Joint Committee recommends that, with the abrogation of the doctrine of contributory negligence, plaintiff's negligence should not defeat the conclusion reaised by res ipsa loquitor, but it should reduce defendant's liability.

4. Assumption of the Risk. The concept of assumption of the risk has been confused from the beginning, but until the adoption of comparative fault, this confusion was not significant. Whether the plaintiff was considered to have been contributorily negligent or to have assumed the risk made no difference because both were complete defenses.

When the Court in Li v. Yellow Cab Co., supra., judicially adopted the doctrine of comparative negligence, it held:

> ". . . the defense of assumption of the risk is also abolished to the extent that it is merely a variant of the former doctrine of contributory negligence: both of these (last clear chance and assumption of the risk) are to be subsumed under the general process of assessing liability in proportion to negligence" (Li v. Yellow Cab Co., supra., 829).

The crucial question becomes, when is assumption of the risk assumption of the risk and when is it merely a variant of the doctrine of comparative negligence?

Traditionally, the elements of contributory negligence were:

> "(1) Plaintiff subjectively and voluntarily
> (2) Accepts a specific known risk of harm
> (3) Arising from the conduct of defendant."
> (C. Luther, Survey of Torts, Sec. 9.12, p. 177, 3d Ed., 1977).

The elements of assumption of the risk were:

> "(1) Plaintiff's conduct fell below the standard of care required for plaintiff's own protection;
> (2) Plaintiff's conduct, along with defendant's negligence, was a cause-in-fact;
> (3) Of harm to the plaintiff or plaintiff's property (Id. Section 9.1 at 167).

Torts scholars have recognized two variant forms of assumption of the risk:

a. Express Assumption: where plaintiff's acceptance of the risk is express; that is, written or oral;

b. Implied Assumption: where plaintiff's acceptance of the risk can be implied by his conduct. For example, plaintiff may know that defendant has defective brakes. Defendant offers plaintiff a ride. Plaintiff accepts the ride. Although plaintiff

doesn't state, "I accept the risk," he tacitly does so by taking the ride, impliedly agreeing to take his own chances.

In both of these situations, plaintiff may be acting reasonably in accepting the risk. He may also be acting unreasonably. When the unreasonable assumption is the implied form, then the assumption of the risk may overlap with the concept of contributory negligence. This is because the actor's conduct in unreasonably accepting the risk fell below the standard of care required for his safety. This has been a source of great confusion.

The confusion may be resolved by the recognition that assumption of the risk is a matter of knowledge of the danger and intelligent acquiescence in it, while contributory negligence is a matter of some fault or departure from the standard of conduct of the reasonable man (see, Prosser, Law of Torts, at 441, Section 68). Assumption of the risk is a form of agreement consenting to the risk created by defendant; by contrast, contributory negligence is conduct amounting to unreasonably encountering a risk. However, as Gary Schwartz points out in his paper entitled "Assumption of the Risk," it is difficult to recognize the conduct versus consent distinction in cases which are not clear-cut. Another attempt to resolve the confusion is to distinguish between primary and secondary assumption of the risk. In Meistrich v. Casino Arena Attractions, Inc., 155 A.2d 90, the court differentiated primary and secondary assumption of the risk as follows:

> "In this area, assumption of risk has two distinct meanings. In one sense (sometimes called its 'primary' sense), it is an alternate expression for the proposition that defendant was not negli-

> gent, i.e., either owed no duty or did not breach the duty owed. In its other sense (sometimes called 'secondary'), assumption of risk is an affirmative defense to an established breach of duty. In its primary sense, it is accurate to say . . . defendant was not negligent. But in its secondary sense, i.e., as an affirmative defense to an established breach of defendant's duty, it is incorrect to say plaintiff assumed the risk whether or not he was at fault."

Under Meistrich, to determine if assumption of the risk in its secondary sense differs from contributory negligence, plaintiff's conduct under the former is measured by the standard of the reasonably prudent man. If plaintiff acts unreasonably, nothing distinguishes it from contributory negligence (Id. at 92).

This produces an anamalous result that a plaintiff, reasonably assuming the risk, is barred from recovery whereas if he unreasonably assumes the risk (contributory negligence), his recovery is merely reduced. For this reason and because of the inequitable results which could come from the subtle distinctions of conduct versus consent and reasonable versus unreasonable conduct, the staff of the Joint Committee recommends that assumption of the risk be retained as a defense only where it is express as defined above.

5. Set-off. Under existint Code of Civil Procedure Section 666, if a defendant cross complains against the plaintiff, and establishes at trial that the damages in the cross complaint exceed the damages in the complaint, judgment on the cross complaint must be given only for the excess.

For example, if plaintiff's damages are determined to be $5,600 and defendant's damages were determined to be $60,000,

the Court would be required by Section 666 to off-set the two awards and render a judgment for defendant in the sum of $54,400.

Under Section 431.70 of the Code of Civil Procedure, when there are cross demands . . . the two demands shall be deemed compensated, so far as they equal each other.

In the above example, under CCP §431.70, if plaintiff's claim against defendant had been $60,000 and defendant's claim had been $5,600, defendant's claim would off-set that of plaintiff giving plaintiff a net recovery of $54,400.

In a recent case, plaintiff filed a complaint and defendant filed a cross-complaint, both sought bodily injury damages for negligence arising out of a collision between the vehicles of the parties. Plaintiff's damages were found by the jury to be $100,000, but were assessed at $60,000 in view of the finding that 40% of the negligence was attributable to plaintiff. Defendant's damages were found to be $14,000, but were assessed at $5,600 on account of the 60% of negligence attributable to defendant. The trial court off-set the two awards pursuant to Code of Civil Procedure §§431.70, 666 and rendered judgment for plaintiff in the sum of $54,400 (Superior Court of Los Angeles County, No. SWC 25105, James F. Healey, Jr., Judge). The Court of Appeal affirmed (Jess v. Hermann, 79 Cal. App. 3d 140). A petition for hearing was granted by the Supreme Court (Jess v. Herman, Id. 6/15/78, L.A. 30967).

As the appellate court points out, it is difficult to conceive how any other result could be reached in view of the clear mandate of the Legislature in Code of Civil Procedure §§431.70 and

666. Plaintiff's argument is that the judicial adoption of the principles of comparative fault warrants a different result.

It is interesting that California's adoption of comparative negligence has closely followed that of Florida.[13] It is not surprising to learn that plaintiff relies on the Florida case of Stuyvesant Insurance Co. v. Bournazian, (Fla. 1977) 342 So. 2d 471, for the support of the proposition that the rule permitting set-off should not be applicable under principles of comparative fault. The Court in that case said:

> "We conclude . . . that the concept of 'set-off' as announced in Hoffman applies only between uninsured parties to a negligence action or to insured parties to the extent that insurance does not cover their mutual liabilities." (Id. at 474).

One rationale for such a view is that "judgments for fault-discounted net damages are never to be off-set against each other; they represent real and compensable injuries."[14]

The problem of full compensation for the injury arises not so much as a result of the set-off, but the problem of the right of recovery by an insured from his own insurer for the amount of the non-excess set-off damages for hwich he is uncompensated.

A viable resolution to the problem is found in Posner, Reeslund & William, Comparative Negligence in California: Some Legislative Solutions--Part III, 9/9/77, L. A. Daily Journal at 4-25:

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[13] See, e.g., Hoffman v. Jones (Fla. 1973) 280 So. 2d 431, and Li v. Yellow Cab Co. (Cal. 1975), supra. at 13 Cal. 3d 804 (judicial adoption of comparative fault).

[14] George & Walkowiak, "Blame and Reparation in Pure Comparative Negligence: The Multi-Party Action," (1976) 8 Sw. U.L.Rev. 1, 60.

> "Provide for set-off in actions involving comparative negligence without exception, but retaining in an insured party the right to be reimbursed by his insurer in the amount that his own damages reduced the insurer's liability" (Id. at 6).

This is the recommendation of the staff of the Joint Committee on Tort Liability and it is hoped immediate legislative action will be taken. In the meantime, perhaps the Supreme Court will heed the wise words of the author of the appellate decision:

> "The Legislature did not have in mind cross-demands based upon the doctrine of comparative negligence when it adopted either section 431.70 or section 666 of the Code of Civil Procedure. Nonetheless, the interpretation advocated by both parties in this case would create an exception to the general rule stated in those sections, in effect amend them by judicial fiat. As the above commentaries clearly demonstrate, the question whether such an exception should be created involves serious issues of policy respecting the degree to which loss shifting from the injured party to society in general is justified. This court simply does not have available to it the resources necessary to the valid resolution of such issues. We should, therefore, resist any temptation to engage in judicial amendment of the clearly applicable sections of the Code of Civil Procedure which the Legislature has declined to amend." (Jess v. Hermann, supra. at 148-49).

XI

CONTRIBUTION AND INDEMNITY:

PROBLEMS IN MULTIPLE PARTY LITIGATION

With judicial adoption of comparative fault, the court recognized that "problems of contribution and indemnity among joint tortfeasors lurk in the background" (Li v. Yellow Cab, supra. at 823). Nevertheless, the court forged ahead adopting pure comparative fault and stating:

> "Pending future judicial or legislative developments, we are content for the present to assume the position taken by the Florida court in this matter: 'We feel the trial judges of this State are capable of applying [a] comparative negligence rule without our setting guidelines in anticipation of expected problems. The problems are more appropriately resolved at the trial level in a practical manner instead of a theoretical solution at the appellate level. The trial judges are granted broad discretion in adopting such procedures as may accomplish the objectives and purposes expressed in this opinion (citation omitted)" (Li v. Yellow Cab Co., supra. at 826-27).

It has been over three years since the Li decision and anyone who has reviewed the great number of appellate court cases involving comparative fault issues knows that trial courts are still struggling to resolve the problems.

Some of the problems stem from the status of the substantive law subsequent to Li v. Yellow Cab Co., supra. (whereas other problems arise as a matter of proper procedure).

It is hoped that what follows will assist the Legislature in resolving the pressing problems presented by adoption of the comparative fault system.

A. Substantive Law Prior to Li.

1. Contribution and Indemnity.

a. Contribution: Traditionally, contribution is the right of one who has discharged a common liability to recover from another also liable, the aliquot portion which he ought to pay or bear (Black's Law Dictionary, 399 (4th Ed. 1968). Contribution was the right to partially shift the loss. California Code of Civil Procedure Section 875 provides that only those tortfeasors who are joint judgment debtors are entitled to contribution rights;

Section 876 provides that the portion to be shifted is determined by dividing the judgment equably among all joint judgment debtors. That is, pro rata sharing. Sections 578 and 579 provide a judgment may be against one or more of several defendants. These sections have been interpreted consistently with the common law that defendants in a tort action are jointly and severally liable and judgments may be rendered against more or one of them (Proper v. Sutter Drainage District, [1921] 53 Cal. App. 576).

This plan of contribution may be exemplified as follows: suppose that "A" is stopped at a stop light. "B" is behind "A" and "C" is following "B". "B" stops, but "C" does not. "C" hits "B" causing "B" to hit "A". "A" sues "B" and "C" on the theory that "B" stopped too qjickly and "C" didn't stop at all. Joint judgment is rendered for "A" against both "B" and "C" on the theory that "B" and "C" are joint tortfeasors. "A" may satisfy that judgment by proceeding entirely against "B". Upon total payment of the judgment by "B", "B" then has rights of contribution against "C". The amount of those rights is the pro rata share or 50% since there were two defendants.

b. Indemnity: Indemnity is the shifting of the entire loss from one tortfeasor who has been compelled to pay it to the shoulders of another who should bear it instead (Prosser, Law of Torts, [4th Ed.] Section 51 at 311 [1968]).

Code of Civil Procedure Section 875 subordinates the right of contribution to indemnity rights providing:

> ". . . (b) Such right of contribution shall be administered in accordance with the principles of equity . . .

> (f) This title shall not impair any right of indemnity under existing law, and where one tortfeasor judgment debtor is entitled to indemnity from another, there shall be no right of contribution between them."

The courts have long implied a right of indemnity shifting the entire loss from one who was merely passively or secondarily negligent. If, however, a party were active in causing the harm, no right to indemnity would accrue.

The operation of this principle may be seen as follows: assume the facts in the above example that "C" hits "B", causing "B" to hit "A". If both "B" and "A" were rightfully stopped at a stop signal and "C" failed to stop because he knew his brakes were worn out, then "C" would be actively negligent. "B" on the other hand can be held to being only secondarily negligent by rear-ending "A". If "A" sues both "B" and "C", or if "A" sues "B" and "B" cross complains against "C". upon satisfaction of the entire judgment to "A", "B" has rights to indemnity as against "C". The amount of those rights is equal to the entire amount he paid to "A" since indemnity would shift the entire loss.

B. Post-Li Law. In the appellate decision of American Motorcycle v. Superior Court of Los Angeles, 65 Cal. App. 3d 694, 700, Justice Thompson pointed out how the adoption of comparative negligence compelled changes in the then existing provision for contribution and indemnity.

> "The impact of 'pure' comparative negligence eliminates totally the all-or-nothing rule on the side of the tort coin which determines plaintiff's right of recovery. The same reasoning . . . is equally applicable to the obverse side of the coin--that which determines the extent of the relative liability of persons who may be liable in negligence to plaintiff."

This is because the system of comparative is based on the principle that the extent of liability determines the extent of fault. Thus, as aptly stated by Justice Thompson in his appellate opinion in American Motorcycle Association v. Superior Court:

> "In a system where the liability of several defendants concurrently causing an injury is based upon fault, the conclusion is that the extent of fault of each [defendant] should govern the extent of liability of each."

E X H I B I T A

78-392

REPORT TO THE STATE LEGISLATURE'S JOINT COMMITTEE ON TORT LIABILITY

THE APPLICATION OF COMPARATIVE NEGLIGENCE IN STRICT LIABILITY CASES

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UCLA School of Law
June 23, 1978

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A. Daly is correct in holding that in a strict-liability/contributory-negligence situation, liability should be divided between the plaintiff and the defendant, rather than resting on the defendant alone. The Legislature should not disturb this Daly holding.

B. Daly's "guidance" on the method of liability division is not sufficient. As to what the method should be, the Legislature's intervention would be appropriate.

C. If liability division is to involve a "comparison," the best comparison rule would be one instructing the jury to compare the plaintiff's and the defendant's "responsibility" for the accident--with "responsibility" defined to include the extent of the defect in the defendant's product, the extent of the unreasonableness in the plaintiff's conduct, and (probably) the extent to which this defect and this conduct have causally contributed to the accident.

D. "Best" as this comparison formula may be, it contains quite significant problems. "Product" can be compared to "conduct"--but it is clearly awkward to do so.

This awkwardness is quite serious enough to warrant consideration of alternative techniques for dividing liability in the strict-liability/contributory-negligence situation.

1. The recovery of the contributorily negligent plaintiff could be diminished by a flat 30 percent.

2. The recovery of the contributorily negligent plaintiff could be diminished by as much as 50 percent, depending on the jury's assessment of the extent of the unreasonableness in the plaintiff's conduct.

3. The contributorily negligent plaintiff could be denied recovery for pain and suffering, but given a full recovery for his economic losses, and for a reasonable attorney's fee as well.

E. Of all these alternatives, I rank D-3 first. Caveat: Perhaps I am attracted to D-3 by the intellectual interestingness of the ideas supporting it. Among the D's, after D-3 I am indifferent as between D-1 and D-2. If Barker is not clarified by the Legislature, any of the D's may be preferable to C. If Barker is clarified, I would be uncertain as to whether D-1 or D-2 is preferable to C. D-1 and D-2 "modify" Daly (D-3 does this also), while C can be regarded as an "elaboration" of Daly. C is therefore more "conservative" than the D's. Even if C merely elaborates Daly, this elaboration is greatly needed, in order to stave off serious post-Daly confusion; therefore, the Legislature should at least take the C step.

F. Legislation should be enacted to eliminate or minimize the differentials between strict liability law, negligence law, and implied warranty law in their treatment of the contributory negligence of the product plaintiff.

78-398

REPORT ON APPLICATION OF COMPARATIVE NEGLIGENCE IN STRICT PRODUCTS LIABILITY CASES

I. Legal Background on Products Defenses

A. Negligence.

The product-accident victim has been allowed to sue the product manufacturer under a negligence theory in California for many decades. Prior to 1975, in a negligence action the victim's contributory negligence functioned as a complete defense, as did any conduct on the part of the victim that the law regarded as an assumption of risk. In 1975, however, the Supreme Court ruled, in Li v. Yellow Cab Co, 13 Cal. 3d 804, 532 P.2d 1126, 119 Cal. Rptr. 858 (1975), that comparative negligence replaces the traditional contributory negligence rule in California negligence cases. After Li, therefore, if a product victim sues under a negligence theory, any contributory negligence on his part reduces his damages but does not bar his recovery. What about assumption of risk? According to Li, in many of its applications, assumption of risk is a mere "variant" of contributory negligence; in these applications, assumption of risk should be handled by the comparative negligence process. Li leaves open what the result should be in those cases in which the victim's assumption of risk can not be characterized as a variant of contributory negligence.

B. Implied warranty.

The sales law doctrine of implied warranty is recognized in California via the Uniform Commercial Code. Cal. U. Com. Code § 2314. There appear to be significant "privity" limitations on an implied warranty claim, and under the Code prompt notice to the manufacturer is a prerequisite to the later prosecution of a claim. In its ordinary commercial applications, implied warranty rarely raises any issue of contributory negligence or assumption of risk.

Occasionally, the implied warranty theory is relied on in a personal injury context. E.g., Hauter v. Zogarts, 14 Cal. 3d 109, 534 P.2d 377, 120 Cal. Rptr. 681 (1975). What the status is of tort doctrines like contributory negligence and assumption of risk in a claim based on the sales doctrine of implied warranty is something that the law, in California and elsewhere, has never made clear. See L. Frumer & M. Friedman, 2 Products Liability § 16.01[3]. Compare Kassouf v. Lee Bros., Inc. 209 Cal. App. 2d 568, 26 Cal. Rptr. 276 (1962) with Link-Belt Co. v. Star Iron & Steel Co., 65 Cal. App. 3d 24, 135 Cal. Rptr. 134 (1977).

C. Strict liability.

Strict liability was established in California by the California Supreme Court in 1963, in its landmark decision of Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 21, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). Surprisingly, not until

1972 did the Court finally start to address the question of the affirmative defenses available in a products liability action. Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972), involved a person injured by a rotary lawnmower when his hand came in contact with a rotating blade after he slipped on a wet lawn while attempting to retrieve an object in his path. This conduct on the victim's part entailed rather clear carelessness of the contributory negligence sort. In Luque the Supreme Court, accepting the guidance of the Torts Restatement, held that "ordinary contributory negligence" is no defense in a strict liability action. However, the Court also ruled that a complete defense does exist when "the plaintiff's negligence . . . consists in voluntarily and unreasonably proceeding to encounter a known danger, more commonly referred to as assumption of risk. For such a defense to arise, the user or consumer must become aware of the defect and danger and still proceed unreasonably to make use of the product." This defense is obviously a hybrid of contributory negligence and assumption of risk, dealing with those situations in which the two defenses "overlap." What the status is of assumption of risk as a products liability defense when the plaintiff's conduct, in confronting the product danger, is "reasonable" rather than "unreasonable" in character is a question which the Luque opinion leaves open.

Horn v. General Motors Corp., 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976), was decided by the Supreme Court subsequent to Li v. Yellow Cab. However, the trial in Horn was prior to Supreme Court's Li decision, and hence under the Li prospectivity rule, the Li comparative negligence holding could not be applied. Turning to pre-Li law, the Supreme Court reaffirmed its Luque rulings on contributory negligence in strict liability. The Court made clear, moreover, that in order to fall within the hybrid contributory-negligence/ assumption-of-risk defense, not only must the plaintiff's conduct be deliberately risky, but the plaintiff must actually know of the defect in the defendant's product which adds to the hazard. Justice Clark, dissenting in Horn, indicated his view that in light of Li comparative negligence should be deemed applicable in a strict liability action.

II. Daly

In Daly v. General Motors Corp, 20 Cal. 3d 725, 144 Cal. Rptr. 380 (1978), the victim, driving his car while intoxicated, collided into a metal divider on the Harbor Freeway in Los Angeles. On impact, the door of his car flew open; the resulting legal claim was that a defectively designed door latch allowed this to happen. The victim was ejected from the car and eventually died. Had he remained in the car, his injuries would have been relatively minor.

The victim was not wearing his seatbelt, and had failed to depress the door lock; had seatbelts been worn or the door locked, the victim's ejection from the vehicle would have been prevented. The claim in Daly was for the enhanced injuries (mainly, death) allegedly due to the design defect. The victim was clearly guilty of contributory negligence in his manner of driving his car. His failure to lock the door probably entailed contributory negligence; whether his failure to wear seatbelts amounts to contributory negligence in California is an open question. (This issue has divided courts in other jurisdictions.) Since, however, the Daly trial (like that in Horn) preceded the Supreme Court's decision in Li, the Luque rules on contributory negligence were applicable at that trial. Since none of the instances of contributory negligence fell within the boundaries of the contributory-negligence/assumption-of-risk hybrid, none of them were available as a defense in the Daly suit. Nevertheless, the trial judge allowed introduction of the evidence of the plaintiff's intoxication, under a rather complicated theory unrelated to contributory negligence. The jury's verdict went for the defendant, and the wrongful-death plaintiffs appealed.

On appeal, the Supreme Court ruled that the trial judge committed error in his complicated ruling on the admissibility of the intoxication evidence. This error required the

reversal of the jury's verdict and a remand of the case for a new trial.[1/] Since this trial would be subsequent to Li, however, the Court now had the occasion to consider the application of comparative negligence in a strict products liability action. The Court majority noted that "we stand . . . at the point of confluence of these two conceptual streams"--the strict liability stream and the comparative negligence stream. By a 4-3 vote, the Court's ruling was that comparative negligence does apply in a strict products liability action. Justice Richardson wrote the majority opinion, joined in by Justices Tobriner, Clark, and Manuel. Justice Clark also wrote a separate concurrence. Justice Jefferson (sitting in lieu of Justice Newman) wrote a dissenting opinion on the comparative negligence issue, which was joined in by Chief Justice Bird. Justice Mosk wrote his own dissenting opinion, which began with the claim that "this will be remembered as the dark day when this Court, which heroically took the lead in originating the doctrine of products liability . . . beat a hasty retreat almost back to square one."

1/ For purposes of the retrial, the Court clarified that "defective design" is to be determined by reference to "the product as a whole," not by looking at single design components in "isolation." This is an important addition to Barker.

III. The Correctness of Daly.

Justice Mosk's lament notwithstanding, the Daly Court's view of general tort policy seems correct.[1/] Li v. Yellow Cab establishes a strong policy on behalf of the doctrine of comparative negligence. The comparative negligence policy clearly applies in actions brought against the product manufacturer under a negligence theory. Is there anything so special about strict liability as to displace this policy when the plaintiff chooses to rely on the strict liability doctrine? This question can be answered by looking at the policies underlying strict liability.

One of them is to protect consumers "who are powerless to protect themselves," or who are "otherwise defenseless." As Justice Clark first pointed out in his Horn dissent and as Justice Richardson indicates in his majority opinion in Daly, this policy has little application to the victim whose contributory negligence is a necessary and proximate cause of his own injury.

Another seeming policy of strict liability relates to loss spreading. This loss-spreading rationale, is, however,

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1/ Courts in other jurisdictions are divided on the strict-liability/comparative-negligence question--although what seems to be the majority view is in agreement with Daly.

an uncertain one. Standing alone, the rationale clearly proves too much, since it would suggest imposing liability on the manufacturer for all injuries occasioned by the use of its product, quite without regard to whether the injury is attributable to any product defect. Yet all the California cases, culminating in Barker, insist on the "defect" requirement and refute the idea that the manufacturer is simply a loss-spreading "insurer." Addressing the uncertain loss-spreading rationale for strict liability, the Daly majority suggests that "as to that share of plaintiff's damages which flows from his own fault, we discern no reason of loss-spreading policy why it should, following Li, be borne by others [through the loss-spreading process]." As a "soft" response to a "soft" problem, this Daly reasoning may be adequate. A different response would point to the fact that the damages which the plaintiff loses under comparative negligence will, practically speaking, usually be damages for the plaintiff's pain and suffering. And as will be suggested below, whatever the general merits of the loss-spreading rationale, it is hard to see how it has any application to intangible losses like pain and suffering.

Another policy of strict liability is to reduce the number of product-related accidents by giving a certain safety incentive to the product manufacturer. The Daly opinion reasons that this incentive would not be curtailed

by the recognition of comparative negligence. Since comparative negligence merely reduces liability, "the manufacturer's liability, and therefore the incentive to avoid and correct product defects, remains." This reasoning seems thin. Of course comparative negligence does not eliminate the manufacturer's liability, but it clearly diminishes that liability in a significant way, and to that extent reduces the safety incentive effects of the strict liability rule. The stronger rebuttal to the accident prevention rationale--although one ignored by the Daly Court--has been suggested by Professor Fleming. By replacing the rule of contributory negligence as no defense with the rule of comparative negligence, the law may somewhat reduce the safety incentives operating on the manufacturer, but at the same time the law creates a significant safety incentive operating on the product consumer. As Professor Fleming states the point, "the chance should not be missed to put some pressure at a strategic point for the sake of accident prevention . . . ." Fleming, Comparative Negligence At Last: By Judicial Choice, 64 Cal. L. Rev. 239, 270 (1976).

In a recent article, I have discussed the complexities, psychological and otherwise, of that conduct on the part of accident victims which the law regards as contributory negligence. In light of these complexities, it is not clear to me that the defense of comparative negligence, in an

ordinary negligence action, produces better results for accident prevention than a rule entirely eliminating the contributory negligence defense. Schwartz, Contributory and Comparative Negligence: A Reappraisal, 87 Yale L.J. 697, 713-21 (1978). But this lack of certainty cuts both ways: it is also not clear that comparative negligence produces worse accident prevention results than a rule eliminating the contributory negligence defense. And there is nothing in the particular shift from a negligence liability rule to the "defect"-oriented strict liability rule that alters this evaluation. The uncertainty which accompanies the contributory negligence defense in the negligence context thus accompanies it in the strict liability context as well. I would not agree with Professor Fleming that safety incentive reasons affirmatively justify the comparative negligence defense in a strict liability action; but I do conclude that the recognition of this partial defense does no necessary damage to the strict liability's accident prevention policy.

The view set forth by the Daly majority--and this is a view I share--is that principles of fairness call for the recognition of comparative negligence as a partial defense in a strict liability action. See my article, supra, at 721-727. Even conceding the existence of "strict" liability, it is simply unfair to require a manufacturer to pay full common law damages for an accident that would never

have occurred had it not been for the unreasonable, careless, or foolish conduct of the accident victim. Comparative negligence is one obvious way for accomodating those policies which call for manufacturer's liability and the principle of fairness that requires that the plaintiff's foolish conduct be taken into account. In accord with this assessment is Pan-Alaska Fisheries, Inc. v. Marine Const. & Design Co., 565 F.2d 1129, 1140 (1977) (to "impose the whole cost on the manufacturer" would "offend our sense of justice and fair play.")

Daly's own facts illustrate this fairness reasoning. It would seem grossly unfair to impose liability on General Motors for the full tort-law damages resulting from the victim's death while taking no account of the victim's drunk and incompetent driving which caused the accident in the first place. (In reading Daly, colleagues of mine have been startled by the Supreme Court's holding that the evidence of the victim's intoxication was legally inadmissible. I have been able to reassure them that Daly's major holding is exactly that in this post-Li era of comparative negligence, this intoxication evidence can be given due weight.) Insofar as Daly calls for a division of damages in the strict-liability/contributory-negligence situation, Daly is right, and for the right "fairness" reasons. Indeed, the force of the fairness logic is not lost on Justice Mosk, his protestations to the contrary notwithstanding. According to Mosk,

"one who employs a power saw to trim his finger nails--and thereafter finds the number of his fingers reduced--should not prevail to any extent whatever against the manufacturer even if the saw had a defective blade." Justice Mosk understands this result primarily in terms of the hybrid contributory-negligence/assumption-of-risk defense endorsed in Luque and Horn.[1/] As the Horn reasoning makes clear, however, the Mosk hypothetical does not come within the boundaries of the Luque-Horn defense, since the user of the power saw has no knowledge of the saw's defective blade at the time he engages in his grossly unreasonable act. Therefore, the Luque-Horn defense is not available as an explantion of why such a consumer should not be allowed to recover. Under Daly, this consumer's contributory negligence would reduce his recovery, and by a huge percentage, given the gross quality of his contributory negligence. In so far as the Mosk hypothetical seeks to take account of the consumer's unreasonable conduct, this is a proper result.

IV. The Comparison Process

Justice Jefferson's dissent in Daly, joined in by the Chief Justice, relied (unlike the Mosk dissent) not so much

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1/ Given such facts, recovery could possibly be denied on grounds the product use was not "reasonably foreseeable." This "use" notion is a gloss on the "defect" and "proximate cause" doctrines rather than an affirmative defense dealing with the plaintiff's risky conduct.

on any larger theoretical principles but rather on what Justice Jefferson perceived to be the practical impossibility of comparing in any meaningful way the contributory negligence of the products plaintiff to the strict liability of the products defendant.

> The majority's assumption that a jury is capable of making a fair apportionment between a plaintiff's negligent conduct and the defendant's defective product is no more logical or convincing than if the jury were to be instructed that it should add a quart of milk (representing plaintiff's negligence) and a metal bar three feet in length (representing defendant's strict liability for a defective product) and that the two added together equaled one hundred percent.

The practical difficulties of comparison do indeed form the largest objection to the Daly holding, and the Daly Court's explanation of the comparison process is the weakest part of the Daly opinion. Before discussing the strict liability issue, however, it is worthwhile, as Justice Clark's concurring opinion suggests, to discuss how the comparison process works in an ordinary comparative negligence suit.

A. The Comparison Process in Ordinary Negligence Cases

Justice Jefferson's opinion seems to assume that comparative negligence easily produces very intelligent results in an ordinary negligence action. In his Daly concurrence, Justice Clark (who dissented in Li) denies that this is so; since he finds the comparison process perplexing in even an ordinary negligence case, he is not greatly impressed with the difficulties of extending comparison into strict liability. Justice Clark's Daly concurrence harkens back to his dissenting opinion in American Motorcycle Association v. Superior Court, 20 Cal. 3d 143, Cal. Rptr. 692 (1978), where he had similarly complained about the shagginess of comparative negligence even in ordinary negligence cases.

> If the first party to an accident drove ten miles in excess of the speed limit, the second 50 miles in excess, it is clear that the second should suffer the lion's share of the loss. But should he pay for 55 percent of the loss? 95 percent, or something in between? That question cannot be answered with any precision, and human beings will not answer it consistently. Yet that is the easiest question presented in comparing fault because we are

> dealing only with apples. When we add oranges to the comparison, there are no guidelines. If the first driver also was driving under the influence of Jack Daniels, reasonable judges and juries will disagree as to who should bear the lion's share of the loss, much less the percentages. Finally, when the case is pure apples and oranges--one party speeds, the other runs a stop sign--there is no guidepost, much less guidelines, and acting in furtherance of the Li principle, reasonable judges and juries can be expected to come up with radically different evaluations.

1. Comparing "Negligence"

Li explicitly calls for a comparison of the "negligence" of the two parties. How is "negligence" to be understood?

(a) Comparing Risk-Burden Unreasonableness

A standard definition of negligence, accepted in California (see Weirum v. RKO General, Inc., 15 Cal 3d 40, 47, 539 P.2d 36, 48, 123 Cal. Rptr. 468, 472 1975), is that an actor's conduct is unreasonable and hence negligent if the risk the conduct foreseeably creates exceeds the burden the actor would need to bear in order to prevent the

risk. This definition suggests that two parties' negligence can be properly compared by looking at the magnitude of the unreasonableness of each party's conduct, as measured in risk-burden terms. For purposes of illustration, assume that full quantification is possible, and assume further that the risk jointly created by the plaintiff's and the defendant's unreasonable conduct can be measured at $100. The cost the plaintiff would incur in abstaining from that conduct is, let us say, $40; the cost the defendant would incur is $10. Given the risk-burden definition of negligence, the comparison could be carried out in either of two ways. See my article, supra, at 705-06 n. 44. One could compare the defendant's prevention costs to the plaintiff. On the stated $40-$10 facts, the defendant could be deemed four times as negligent as the plaintiff; the defendant would thus be liable for 80% of the plaintiff's injuries. Or, one could say that the defendant's negligence was 1.0 - .1 = .9, while the plaintiff's negligence is 1.0 - .4 = .6. Under such a calculation, the defendant would be liable for 60 percent of the plaintiff's injuries (.9 of .9 + .6).

Thus, even given a very "lean" risk-burden definition of negligence, the comparison process contains a significant conceptual ambiguity. And, of course, the further point is that the original assumption of quantification is totally unreal. In no case will a jury be presented with anything

remotely resembling the kind of data hypothesized above. The risk-benefit approach can therefore serve as an important guideline for comparison, but no more than that.

(b). Comparing "Fault" or "Culpability".

In any event, the risk-burden explanation of negligence (and of contributory negligence) is not the exclusive explanation. For these doctrines are frequently, if not most commonly, defined in terms of the morally laden language of "fault." Li is explicit that it is "fault" that is to be the subject of comparison. Li, American Motorcycle Association, and Daly all indicate that the parties' "culpability" should be taken into account.[1/] The Uniform Comparative Fault Act, recently endorsed by the National Conference of the Commissioners on Uniform State Laws and referred to most approvingly in Daly, asks the jury to consider "on a comparative basis . . . the nature and quality of the conduct of the parties." Sec. 2(b).

"Culpability" comparisons in a way favor plaintiffs since, as the Court has noted in AMA and Daly, contributory negligence--conduct merely running an unreasonable risk to one's self--is in a way not culpable at all.[2/] A further

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1/ Li is somewhat ambivalent on "culpability."

2/ See Schwartz, supra, at 722-23. However, for motorist plaintiffs, bad driving almost always runs an unreasonable risk to others, as well as to the motorist himself. Ibid. It would be unreal to expect the jury to ignore this anti-others aspect of the motorist's conduct in making its overall assessments.

feature of any "fault" or "nature and quality" comparison is that it seems vulnerable to the rhetorical skills of the particular trial lawyer and to the temperament of the particular jury. Also, "culpability" or "nature and quality" appear to be very open-ended concepts. There may be any number of factors not technically relevant to the issue of negligence as such which do become relevant when the issue is "nature and quality."[1/] This seems clearly true of "mitigating" circumstances. Old age, for example, may be legally irrelevant to the ascertainment of negligence, but it is clearly a factor a jury can take into account for "nature and quality" comparative purposes. See Helms v. Fox Badger Theaters Corp., 253 Wis. 113, 33 N.W.2d 210 (1948). The same kind of analysis pertains to aggravating factors. Thus the fact that Justice Clark's driver was drinking Jack Daniels may or may not legally relate to the question whether the driver's actual motoring conduct was itself unreasonable, but it certainly bears on the issue of the driver's "culpability," or the "nature and quality" of his conduct. Whatever the judge's instructions, one can be sure that the jury will wish to compare the parties' "fault"[2/]

1/ See BAJI Instruction 14.91: "In comparing the negligence of such persons you should consider all the surrounding circumstances. . . ."

2/ Compare Fleming, supra, at 249, who rejects the idea of any "moral" comparisons.

in a very general moral sense. And one can expect that many questions will be raised about the admissability of evidence arguably relevant to the degree of "fault."[1/]

2. Comparing "Causation."

The English comparative negligence statute, as judicially interpreted, calls for a comparison of the extent to which each party's conduct has caused the accident. See P. Winfield & J. Jolowicz, Tort 116 (9th ed. 1971)). The American Uniform Act is explicit in its endorsement of jury consideration of "how greatly [each party's conduct has] contributed to causing the harm." Sec. 2(b). The original slip opinion in Li contained an explicit reference to a causation comparison; this reference was then deleted from the opinion as finally published. (See Fleming, supra, at 249, n. 46). Whether this deletion precludes the possibility of comparing causation in Li cases is uncertain.[2/] Li did abolish the causation-oriented doctrine of last clear chance; yet Li has been interpreted elsewhere as allowing a comparative-negligence jury to consider the basic "components" of a last clear chance situation. Macon v. Seaward Constr. Co., 555 F.2d 1,

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1/ See BAJI 14.91: ". . . all the surrounding circumstances as shown by the evidence."

2/ BAJI 14.91 calls for a comparison of "the negligence of such persons . . . and not the mere physical causation for the accident." "Physical" causation is not a phrase that tort law often uses. Does this instruction rule out any consideration of causation, or only exclusive consideration of causation?

2 (1st Cir. 1977) (applying New Hampshire Law). If "causation" is indeed a subject of comparison, an "immediate" cause would bear a greater share of liability than a "remote" cause, a "direct cause" a greater share than an indirect cause, an "active" cause a greater share than a "passive" cause, and so on.

Of course, before any causation comparisons are conducted, each party will presumably be required to show that the other party's negligence was both an "actual cause" and a "proximate cause" of the accident, as those terms are presently defined by law. Once "actual" and "proximate" cause are determined to be present, many American academics will be inclined to argue either that nothing additional can be said about causation, or that nothing additional should be said (on grounds that any further causation distinctions are without substantive import). Professor Fleming hints at such a view, supra at 249 n. 46. But there has been a surge of interest in causation doctrines among tort scholars in recent years. See G. Calabresi, Concerning Cause and the Law of Torts (forthcoming); Epstein, A Theory of Strict Liability, 2 J. Legal Studies 151 (1973). Given this interest, I suspect that many would support the idea of causation comparisons.[1/]

1/ The test case, perhaps, is one's willingness to take into account, for comparative purposes, the "components" of last clear chance.

All would agree, however, that causation should not be the exclusive factor considered; for one thing, in many cases a causation comparison will not produce significant results. Also, assessments of causation can be influenced (often decisively) by independent assessments of fault. Assume two clear negligent causes of an accident, one of them involving rather nasty conduct, the other conduct that is merely somewhat careless. The differential in fault is conducive to the conclusion that the nasty conduct is the accident's primary cause.

3. A Hard Problem: Unidentified Negligence

There is one serious comparative-negligence problem which I have seen only rarely discussed. In some cases one party's evidence may well establish the fact that the other party has been guilty of negligence--yet will nevertheless fail to identify the particular conduct of the party that falls below the negligence standard. This is to some extent true of cases where a party relies on a theory of statutory negligence--and certainly it is true where a party relies on the doctrine of res ipsa loquitor. Consider, for example, the classic res ipsa products case of Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944), where the explosion of a coke bottle was held sufficient to justify a res ipsa reference that the bottler had been negligent, somehow or other. Assume that the victim in such a case had

also been negligent--for example, in failing to heed the explicit warning of a fellow worker that the coke bottle looked wrong and should not be handled. With res ipsa proving the existence of negligence somewhere within the defendant's operation but completely failing to specify what that negligent conduct is, it is not clear what the jury should do when asked to respond to a comparative negligence instruction.

4. The English Experience

England adopted a liability-dividing statute back in 1945. That statute asks the court to reduce the plaintiff's recovery "to such extent as the court thinks just and equitable, having regard to the claimant's share in the responsibility for the damage." While the statute explicably refers only to the plaintiff's "responsibility," it has been interpreted by the courts as implicitly requiring consideration of the defendant's "responsibility" as well. See, e.g., Quintas v. Notimas Smelting Co., [1961] 1 W.L.R. 401, 408. "Responsibility," in turn, has been interpreted as alluding both to the "causative potency" of the party's conduct, (Davies v. Swan Motor Co., [1949] 2 K.B. 291, 326), and also to the extent of the negligence in that conduct. See P. Winfield & J. Jolowicz, supra, at 116-17. (Since strict products liability does not exist in England, the precise Daly issue has not arisen.)

The English statute contains all those shaggy elements that lead Justice Clark to regard comparative negligence as a "nonlaw system," and to denounce it for that reason. (See his AMA opinion.) Yet English commentators, observing the effects of the English statute over a 30-year period, are quite satisfied with the results that it has produced; they refer quite approvingly to comparative negligence as having "been successful in simplifying the law and in removing a source of injustice." P. Atiyah, Accidents, Compensation, and the Law 135 (2d ed. 1976). See also P. Winfeld & J. Jolowicz, supra at 116.

There are, however, surprisingly important differences between English and American tort law that detract from the value of the English precedent. For one, England has abolished trial by jury in almost all civil cases. Since the calculation of percentages under comparative negligence are thus undertaken by a professional judge, the opportunities for an unseemly arbitrariness (of the sort Justice Clark deplores) are greatly minimized. Also, the level of damages in an English tort action is very modest by American standards--even taking account of differences in inter-country wage levels and costs of living. Finally, English trial lawyers ("barristers") are a rather docile lot; they have undoubtedly declined to mount ambitious arguments about the factors to

be taken comparatively into account which one would routinely expect from a typically aggressive American personal injury lawyer.

In sum, the satisfactoriness of the English experience is reassuring, but only to a limited extent.

5. The California Experience So Far

We are now in the third year of the post-Li era. I have talked with a number of California lawyers, representing both plaintiffs and defendants, as to how well Li is working so far. My "findings" are these:

(a) Juries are willing to find some contributory negligence (5 or 10 percent) on the basis of evidence which would not have led any jury to find contributory negligence prior to Li--at a time when such a finding would have defeated the plaintiff's entire recovery.

(b) The juries' percentage calculations are almost always "sensible." Neither lawyers nor their clients have any major complaints. To be sure, the jury's calculations are in a way "subjective"--but no more subjective than juries' traditional determinations as to the existence of negligence or the amount of damages.

(c) The juries' calculations are predictable enough to facilitate the settlement process. Indeed, the Li holding, by turning an either/or legal rule into a mere

question of degree, has been beneficial to the settlement process. (One offsetting consideration: under Li, a plaintiff with possible contributory negligence is better able to risk refusing a settlement and proceeding to trial.)

(d) The BAJI instructions are terse as to the basis of comparison. The lawyers disagree about what it is that the juries are comparing. Some of them insist that causation is the key, while other lawyers understand the jury as comparing the degree of fault (in an intuitive, overall lay sense.)

(e) At least so far, lawyers have done little by way of presenting evidence professing to prove the percentage of fault (as compared to the existence of fault in the first place). However, lawyers do make arguments to the jury about percentages. These arguments are in a way arbitrary--but perhaps no more arbitrary than traditional arguments about (say) the measure of pain and suffering damages.

B. The Comparison Process in Strict Products Liability

1. What Daly Says.

At an early point in the Daly opinion, the Court indicates that "we think the term 'equitable apportionment or allocation of loss' may be more descriptive than 'comparative fault.'" This suggests that the court would want the issue submitted to the jury under a general "equity" or

"justice" instruction which harkens back to the governing provision of the English Act. Even the English Act, however, goes on to explain "equitable and just" in terms of the parties' "responsibility." Later in its opinion, the Daly Court endorses, "for the guidance of trial courts," the special verdict relied on in federal "unseaworthiness" cases (which involve a kind of strict liability). Here Daly suggests that the jury be asked to "state in percentage the extent to which the plaintiff's own negligence contributed to his injuries," then to reduce plaintiff's total injuries by that percentage amount. This, the Court indicates, is "one technique by which the court and jury may approach the task of apportionment."

2. The Approach of a "Plaintiff"-Only Variable

Given Li's language, the Daly opinion can be understood as reasoning that "strict liability is strict liability," that as such it cannot be compared to anything, and that therefore the only variable which should be taken into account is the magnitude of the plaintiff's contributory negligence. (The greater the plaintiff's contributory negligence, the greater the damage reduction.)

This approach is not without appeal. While it would not involve any "comparison," it would entail both a damage reduction and a liability division. Thus, while not technically a rule of "comparative" fault, it displays a strong affinity to basic Li reasoning.

Examined closely, however, the approach exhibits significant problems. If the plaintiff's conduct is very unreasonable, how great should the damage reduction be? 98%? 48%? If the 98% figure is correct, then the approach goes too far, since in such cases it would erect contributory negligence as an almost complete defense, no matter what the defect in the product; this is a result certainly not contemplated by Daly, and certainly not justifiable in principle. The 48% figure, on the other hand, seemingly presupposes a rule that "the plaintiff's contributory negligence, at its worst, should reduce the plaintiff's damages by 50%." This rule is certainly not found in Daly, and is likewise difficult to justify in principle. Finally, the argument on behalf of the approach seems somewhat simplistic. In the products context, strict liability depends upon the existence of a product defect. As will be discussed below, variations in "defect" from case to case weaken the idea that strict liability can only be regarded as an undiscussable, uncomparable given.

Consider, in this regard, the English experience. The English statute is applicable to claims based on a "breach of statutory duty" theory--a theory that entails a kind of strict liability. See P. Winfield & J. Jolowicz, supra, at 117. While the language of the English statute refers only

to the plaintiff's "responsibility," English courts have deemed it appropriate to require consideration of the plaintiff's and the defendant's "responsibility" alike. See the Quintas case, supra.

In California, the BAJI Committee has not taken seriously the Daly Court's plaintiff-only language. Its strict liability instruction, professing to follow Daly, calls for the jury to determine "what percentage of the combined proximate causes of plaintiff's injury is attributable to plaintiff's contributory fault," and "what percentage of such combined proximate causes is attributable to the defective product." BAJI 9.04.

3. Comparing Causation

Especially since causation comparisons have often been undertaken in negligence cases, it can be argued that it is causation that should be compared in strict liability. Indeed, comparing causation diminishes the awkward problem of the lack of fault in strict liability. There is precedent for this. In statutory-duty strict liability cases, English courts are inclined to compare causation. See P. Winfield & J. Jolowicz, supra, at 117. One federal court, adopting comparative negligence for strict liability unseaworthiness, has explicitly suggested a comparison of causation in the strict liability context. See Pan-African Fisheries, supra, 565 F.2d at 139. The "contributed" language in Daly

seems causation-oriented, and there is a similar, if somewhat weaker, causation dimension to the BAJI "attributed" instructions. The Uniform Comparative Fault Act--which explicitly applies to strict liability--calls for a causation comparison.

What are the substantive implications of comparing causation in products cases? In one way products plaintiffs may fare poorly. The defect is "in" the product at the time of the product's retail sale; the careless conduct of the product user is the more immediate or precipitating cause of the accident. Under the immediate/remote explanation of causation, therefore, the reduction in plaintiff's damages is likely to be substantial. Note that this may well be a proper result. When the victim does indeed have the "last clear chance" to prevent the accident, the accident prevention goal of tort law may well suggest placing on the victim a larger share of the liability. See my article, supra, at 707-09.

In other cases, however, a causation comparison will work in the plaintiff's favor. Consider, for example, the depiction of products cases which Justice Mosk sets forth in his Daly dissent.

> A defective product is comparable to a time bomb ready to explode; it maims its victims indiscriminately, the righteous and the evil, the careful and the careless.

As a generalization about all product defect cases, this depiction is clearly wrong. It is absurd to say that the defective door latch in Daly is equivalent to a "time bomb ready to explode;" and on the Daly facts, it is literally inaccurate to say that the defect threatens "the careful and the careless" alike. (If the car motorist in Daly had either locked the door or fastened his seatbelt, he would have escaped the fatal accident.) Yet while the Mosk depiction is improper as a generalization, it certainly is an accurate description of a large number of product cases. (Consider, for example, the danger posed by defective Firestone radial tires, recently well publicized.) In such cases, the defect in the product renders the accident basically inevitable; the plaintiff's conduct can thus be regarded as almost fortuitous as an accident cause. This distinction between inevitable and fortuitous causes bears a relationship to products liability's accident prevention goal, and therefore seems a relevant consideraton in the division of liability between plaintiff and defendant.

Even if one assumes, however, that causation should be compared in a Daly situation, it would be difficult to argue that it is only causation that should be compared. For one thing, in many products cases (as with tort cases generally) causation comparisons will often not be productive. Even

when they do produce results, this may happen only because causation is a "proxy" for other important factors, which should be given explicit (rather than merely indirect) consideration.

4. Comparing Norm Departure

Strict liability requires proof of a product "defect". "Defect" implies a departure from some product norm. As my January Report indicated, in a strict-liability/contributory-negligence situation it should be possible to compare the departure from the norm entailed by the product defect with the departure from the norm of "reasonable conduct" involved in the plaintiff's contributory negligence. This point had been previously suggested by Professor Fleming: the defect requirement provides a "matrix for apportionment" under comparative negligence. Fleming, supra, at 270.

This possibility, promising as it seems, was given no attention by either the Daly majority opinion or by Justice Jefferson's Daly dissent (bewailing the impossibility of comparison). The idea is reinforced by parts of the Supreme Court's January decision in Barker v. Lull Engineering Co., 18 Cal. 3d 413, 143 Cal. Rptr. 225 (1978). Under Barker, design defects are to be determined in accordance with a risk-benefit standard--a close cousin of the risk-burden standard of negligence which California law has incorporated.

Other parts of the Barker opinion, however, suggest that the norm-departure comparison technique can become

difficult. Under Barker, a "production" defect is measured by a deviation-from-the-usual-product test that does not speak of risks and benefits. Of course, the existence of this deviation does make something of a comparison possible. Indeed, for production defect cases, such a strict liability comparison seems no more perplexing than the negligence comparison that would be in order if the plaintiff sued the manufacturer under a negligence res-ipsa theory. (However, as noted, comparing negligence in a res ipsa negligence case is itself more than a little perplexing!)

Also, in a design defect case, the plaintiff can, under Barker, rely on a "consumer expectation" standard that is "looser" than the risk-benefit standard.[1/] (Because of this looseness, I have recommended the revision of this standard in my earlier Barker memorandum.) But, of course, on the contributory negligence side there is a similar looseness: the jury can skirt a risk-burden analysis by simply finding that the plaintiff's conduct was "faulty" or lacked "due care." Even conceding looseness on both the plaintiff's and the defendant's side, in a strict-liability contributory

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1/ "Loosest" of all is the Barker rule that a product is presumptively defective if its "design proximately causes" an accident. In cases in which the plaintiff relies on this presumption, a "defect" comparison becomes almost impossible. I have recommended a substantial cutting down of this aspect of Barker. If Barker is not cut down in this regard, then the opportunities for meaningful norm-departure comparisons in strict liability decline sharply.

negligence case the jury is essentially if implicitly saying that the defendant's product is "wrong" and that the plaintiff's conduct was "wrong." An implicit "wrongness" comparison should not be altogether unfeasible.

The norm-departure comparison has been presented above as an alternative to the causation comparison. But it should be noted that the two techniques may well correlate. Consider again Justice Mosk's "time bomb" depiction. Just as the time-bomb defect is the overwhelming cause of the product accident, so a defect that achieves the metaphorical status of a "time bomb" is likely to be regarded as extremely defective by the jury. A product victim's mere failure to perceive a product defect is a rather passive or omissive sort of accident cause; it is also likely to strike the jury as being no more than moderately unreasonable.

5. A Comparison Proposal

To summarize, if there is to be a comparison in strict liability, the best approach is to compare the extent of norm departure in the product's defect and in the plaintiff's unreasonable conduct. But some consideration can be given also to the extent to which the defect and this conduct have causally contributed to the accident.

As the English experience verifies, the concept of "responsibility" is broad enough to encompass both norm departure and causation. The 1977 Final Report of the U.S.

Interagency Task Force of Product Liability--which strongly urges the appreciation of comparative negligence in strict liability cases--also urges that "responsibility" be the standard. "One can look at [the] comparative responsibility of each party in a strict liability action." P. VII-52. A more precise formulation can be attempted. In a Daly action, the jury could be instructed (in essence) as follows:

"Starting with 100% responsibility for the accident, what is the percentage of the defendant's responsibility for the accident, in light of the extent[1/] of the defect in the defendant's product and the extent to which the defect caused the accident? What is the percentage of the plaintiff's responsibility for the accident, in light of the extent[1/] of the unreasonableness of the plaintiff's conduct and the extent to which that conduct caused the accident? Reduce the plaintiff's full damages by this latter percentage."

6. Several Problems With This Proposal

In my January 1978 Report, I noted that in almost all cases the product defect is associated with negligence somewhere along the line (e.g., if not at the manufacturer's level, perhaps at the supplier's level), and that in a comparative negligence case the plaintiff's contributory negligence can be compared to the negligence--wherever it occurred--which produced the defect. I hereby withdraw that recommendation. First of all, depending on how the variations

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1/ As an adjective for "defect" and "unreasonableness," is there a better word than "extent"?

of the "hindsight" issue are resolved (see my Barker Report), there can possibly be instances of "defect" without any negligence anywhere. But more basically, one of strict liability's most important policies is that the evidence at trial should focus on the product, not on the complexities or obscurities of the manufacturer's underlying conduct. This important policy would be frustrated if, in every contributory negligence case, the conduct of the manufacturer (or some related entity) became a necessary trial issue.

But the withdrawal of my earlier recommendation still leaves open certain significant problems. As noted above, in an ordinary contributory negligence case both plaintiff and defendant possess the apparent right to introduce evidence of various mitigating or aggravating circumstances bearing on the evaluation of either the defendant's negligence or the plaintiff's contributory negligence. What happens in a strict liability case? The plaintiff's contributory negligence can still be "expanded on" in either a mitigating or an aggravating manner. But how about the defendant's defect? Circumstances that might be either "extenuating" or "aggravating" would typically relate to the manufacturer's conduct which gave rise to the defect. Yet to allow consideration of these circumstances would be inconsistent with the important strict liability policy described above.

Yet any rule excluding evidence pertaining to the manufacturer's conduct runs the risk of taking effect in an improperly assymetrical manner. The strict liability policy could be successful in excluding "good conduct" evidence which the defendant might wish to introduce. If, however, the plaintiff has evidence tending to show the defendant's bad conduct, all the plaintiff needs do is allege a negligence count in addition to the strict liability count, and the evidence becomes admissible. (The Supreme Court has upheld the plaintiff's right to plead negligence and strict liability in the same case. Jiminez v. Sears, Roebuck & Co., 4 Cal. 3d 379, 482 P.2d 681, 93 Cal. Rptr. 769 (1971)). And once this evidence is presented to the jury under a negligence theory, it would be unreal to expect the jury to ignore the evidence when the jury renders its strict liability evaluation.

There is a related problem. Assume a contributorily negligent plaintiff who alleges both strict liability and negligence. If the strict liability comparison formula is similar to the negligence comparison formula in important ways, but also different from the formula in material ways, the simultaneous submission of both of these formulae to the jury is certain to produce very substantial jury confusion. This confusion can, of course, be eliminated either by

repealing the Jiminez rule outright (thereby refusing to allow any plaintiff arguing strict liability to concurrently argue negligence), or by selectively repealing Jiminez in those cases raising a non-frivolous contributory negligence issue. While I am sympathetic to a review of the Jiminez rule--see pp 166-167 of my January Report--the Jiminez problem is too complicated to permit full discussion here.

The final problem with norm-departure comparison is perhaps the most general and the most basic. As shown above, straight proposals to compare the extent of risk-burden unreasonableness in ordinary negligence cases founder on the unavailability of data that would make such comparisons possible; lacking this data, the jury's comparison is likely to be of a general moral sort. There will be an equivalent lack of real data in a Daly-type case. And if in such a case the jury understandably seeks to work out a general moral assessment, the jury will find itself in partial conflict with the important strict liability policy that it is the defendant's product, not its conduct, that matters.

C. Overall Assessments

1. As for "ordinary" comparative negligence, Justice Clark's alarm and disdain seem excessive; comparative negligence "works" to the reasonable satisfaction of lawyers and litigants. Jury verdicts seem predictable enough to facilitate the settlement process.

2. However: Ordinary comparative negligence is not nearly so neat and clean as Justice Jefferson seems to assume. Comparative negligence is a shaggy process, often involving real problems of "apples and oranges," and rife with the potential for arbitrariness--at least at the margins.

3. Justice Jefferson is wrong--in strict liability it <u>is</u> possible to develop a comparison formula which is meaningfully sensitive to the precedents of both (a) ordinary comparative negligence and (b) strict liability doctrine.

4. One is required to agree, however, that this strict liability comparison formula adds quite considerably to the clumsiness which mars comparative negligence even in ordinary cases. Indeed, it seems right to conclude that the comparison difficulties in strict liability differ in kind, rather than merely in degree, from the comparison difficulties in ordinary negligence cases. One <u>can</u> compare a defective product and unreasonable product--but this is not easy to do.

5. At the very least, the shagginess that is inherent in the best possible strict liability comparison formula is clearly serious enough to warrant the consideration of alternative methods of liability division in strict liability/ contributory negligence cases. The fairness

reasoning in Daly calls for the division of damages in a Daly-type case--but not necessarily via a "comparative" process. Three non-comparative alternatives for dividing liability are discussed below.

D. Non-Comparison Alternatives

1. The Clark Proposal

Justice Clark concurred in Daly, through strenuously arguing the impossibility of rational comparisons--in negligence cases and strict liability alike. He noted his agreement, however, with Li's basic principles: when both parties have been at fault, neither should bear the full cost of the accident. He then observed as follows:

> Those principles do not require a comparative fault system. Can they not be satisfied by a system which establishes a uniform index factor, such as 30, 50 or 70 percent? A uniform discount of the negligent plaintiff's recovery would eliminate the necessity of the often impossible task of comparing fault. A discount system would bring about consistency and predictability where neither now exists, permitting evaluation and settlement of claims.

The establishment of such a "uniform discount" factor is, Justice Clark suggests, a legislative function. Especially in the strict liability setting, there is considerable appeal in the Clark proposal. Among its virtues is that it would eliminate the lawyer- and jury-time that would otherwise be spent in arguing and deliberating about the proper percentage of damage reduction. (One major weakness in Justice Jefferson's dissent is that, in denying the feasibility of comparisons in strict liability, it declines to consider Justice Clark's plausible "discount" alternative.) Of course, the Clark proposal is incomplete until the exact discount figure is chosen. And the lack of any clear principle that can be relied on to guide the choice between 30, 50, and 70 percent suggests a certain kind of weakness at the proposal's core. (Intuitively, I find myself leaning towards 30% or 40%.)

The proposal can also be criticized on grounds that it would not allow the jury to take account of the varying degrees of the plaintiff's foolishness, and also of the varying seriousness of the defect in the defendant's product. It can be thought that jury consideration of these variables reinforces the fairness reasons justifying the Daly idea of liability-division within strict liability in the first place. This argument is not without merit. But its merit is confined by the truth that in the tort system generally, no attempt is made to "calibrate" the extent of the defendant's

liability to the magnitude of the defendant's tortious conduct: "liability does not fit the tort" in civil law in the way that "punishment fits the crime" in penal law. The victim's conduct apart, a "minor" product defect can easily produce a very substantial tort award. Hence there would be nothing anomalous in allowing the victim's "minor" carelessness to cost the victim (say) 50% of what his award otherwise would be.

2. A Fallback Proposal

As a fallback from the Clark proposal, consideration can again be given to the possibility that in a contributory-negligence/strict-liability, the jury should accept the defendant's strict liability as a given, accept (say) 50% as a "maximum" discount for contributory negligence, and then determine, in accordance with the unreasonableness of the specific plaintiff's conduct, where on the 1% - 50% continuum the reduction of the plaintiff's damages should be (see pp. 25-27, supra). This would allow the jury to consider the variables in the plaintiff's conduct while ignoring variables in the defendant's defect.

3. A New Proposal

An original proposal is this: In products cases, the contributorily negligent plaintiff could be allowed to recover in full for his out-of-pocket losses, but denied recovery for his pain and suffering.[1/]

1/ Even in pre-Li days, some juries found it intuitively fair to deal with the plaintiff's contributory negligence by finding the plaintiff free of fault but then by denying him damages for pain and suffering. See Fleming, supra, at 242-243.

This proposal can be examined from the point of view of both pain and suffering theory and strict liability theory. The victim's pain and suffering, is without doubt, a very real "cost" or consequence of a tortious accident. Yet awarding pain and suffering damages plainly does not serve damage law's ordinary "compensation" function of returning the victim to the pre-accident status quo by reimbursing him for what he has expended. Pain and suffering damages thus plainly call for special study. It has been suggested that these damages alleviate the victim's sense of indignation in having been subjected to a painful injury by the other party's negligent conduct. D. Dobbs, Law of Remedies 545 (1975). But it is doubtful that such indignation is in order in a strict liability action; and certainly it is not in order when the accident would never have occurred absent the plaintiff's own unreasonable conduct.

Recovery for at least "typical" pain and suffering can be assumed to serve an important economic or deterrent function in strict liability action. But this assumption itself assumes that the accident was solely caused by the defect in the manufacturer's product. Once it is established that the plaintiff's unreasonable conduct is a joint cause of the accident in question, the entire accident prevention rationale of strict liability becomes highly uncertain (as noted above).

In an ordinary negligence action, the strongest justification for awarding pain and suffering damages may well be that when a defendant has undergone significant pain and suffering as a result of the defendant's negligent conduct, the community's sense of fairness indicates that the negligent defendant should be required to pay the suffering victim a substantial sum. But given this statement of this fairness rationale, it is unclear whether the rationale has any application when the basis of liability shifts from negligence to strict liability. More importantly, the force of the fairness argument dissipates when the assumption is introduced that the plaintiff's own contributory negligence has been a necessary cause of the plaintiff's own accident.

As for strict liability, the rhetoric which it uniquely utilizes is that of "loss spreading" or "loss distribution." As noted above, however, strict liability's vital "defect" limitation renders questionable how seriously this loss spreading rhetoric should be taken. But the crucial point here is that even to the extent that loss spreading <u>is</u> important in strict liability, the entire idea of loss spreading has no application to pain and suffering harm--harm which is quite literally incapable of being "shifted" (see P. Atiyah, supra, at 487), let alone "distributed."

The non-application of loss spreading to pain and suffering harm can be demonstrated in several ways:

(a) Private persons provide for loss spreading on their own initiative by purchasing first-party insurance. Over the years, no market has developed for "pain and suffering" insurance. This reveals that most people do not regard pain and suffering as the kind of loss that can be intelligently "spread."

(b) Loss-spreading-oriented compensation programs, both actual and proposed, typically choose to provide no or little compensation for noneconomic harm. Thus workers' compensation conspicuously declines to remunerate for pain and suffering. Auto no-fault not only chooses to avoid compensation for pain and suffering, but also curtails the victim's pain and suffering rights as against the negligent motorist. New Zealand's new comprehensive compensation scheme takes account of pain and suffering, but only in a limited and largely symbolic way. Professor Franklin's proposal to replace the existing "negligence lottery" with a comprehensive compensation system is explicit that it would afford no compensation for pain and suffering. Franklin, Replacing the Negligence Lottery: Compensation and Selective Reimbursement, 53 Va. L. Rev. 774 (1967). See also James, Some Reflections on the Basis of Strict Liability, 18 U. La.

L. Rev. 293, 297 (1958). Justice Traynor's ruminations about the loss-spreading goal led in the same direction. The Ways and Meanings of Defective Products and Strict Liability, 32 Tenn. L. Rev. 363, 375-76 (1965).

(c) Consider, finally, the very nature of the loss-spreading idea. That idea suggests that a $15,000 loss, if borne by the accident victim, inflicts a "crushing shock" which is likely to result in social or economic "dislocation." See Franklin, supra, at 800; G. Calabresi, The Costs of Accidents 38 (1971). In turn, this crushing shock can be "cushioned" and the dislocation minimized, if the loss is distributed by requiring (say) 3,000 persons to pay $5 apiece.

This loss-spreading idea appeals to common sense. Moreover, it finds theoretical support in the economist's concept of the diminishing marginal utility of money. Consider, however, what happens to the loss-spreading idea when the harm in question concerns a nonmonetary element like pain and suffering. Let us assume that the victim's pain and suffering will be valued by the jury at $15,000. In this pain and suffering setting, the traditional loss-spreading concept makes sense only if it can be said that pain and suffering imposes on its victim a "crushing blow" which can be eliminated--and in a cost-beneficial way--if 3,000 persons are required to pay $5 apiece.

Now, serious pain and suffering is a horrible thing, but it simply does not result in social or economic dislocation in the loss-spreading sense. To be sure, the pain and suffering victim is significantly benefited by a $15,000 award--but this benefit is accompanied by a $5 cost exacted from 3,000 unwilling others. And nothing in the basic loss-spreading idea suggests that the benefit exceeds its correlated costs. Indeed, if one considers the economic theory of the diminishing utility of money, that theory leads if anything, to the opposite conclusion--that this benefit is less than its costs. (Here, the reasoning becomes mathematical and somewhat complex; it can be furnished to the Committee on request.)

In sum, neither the intuitive idea behind loss spreading nor its theoretical economic explanation supports the proposition that loss spreading is a sensible goal of the law when the "loss" in question is intangible harm like pain and suffering. Thus, even insofar as loss spreading is, in general, an important goal of strict products liability, that goal does not explain the awarding of pain and suffering damages. Eliminating a pain and suffering recovery when the victim has indulged in contributory negligence therefore poses no threat to strict liability's loss-spreading rationale.

For all of these reasons, in a Daly situation, liability could be intelligently divided by allowing the careless

plaintiff to recover in full against the manufacturer for his economic losses while denying the plaintiff all recovery for pain and suffering.

Lining up against this proposal are two countervailing arguments. One is that the proposal would preclude jury consideration of the degree of the plaintiff's fault and the degree of the product's defect. As noted above, in the context of Justice Clark's "discount" proposal, this argument has some strength, but need not be deemed decisive.

Secondly, the proposal can be criticized on grounds that since the contributorily-negligent plaintiff of course is required to pay his lawyer, under the proposal's terms the plaintiff will wind up with much less than full compensation for his monetary losses. What this criticism assumes is what Justice Traynor pointed out in a famous dissenting opinion--that one function served by pain and suffering damages is to allow the plaintiff to compensate his lawyer. Seffert v. Los Angeles Transit Co., 56 Cal. 2d 498, 364 P.2d 337, 15 Cal. Rptr. 161 (1961). Now, the Traynor explanation is vulnerable on several counts. The American legal system has adopted the general rule that even a prevailing party is required to bear his litigation costs. It is therefore uncandid to condone pain and suffering awards (with or without contributory negligence) on the idea that they reimburse for lawyers' fees. See Peck, Compensation for Pain: A Reappraisal in the Light of New Medical Evidence, 72 Tech. L. Rev. 1355, 1374 (1974). Moreover, such a

condonation is wildly imprecise, since on a case-by-case basis the plaintiff's pain-and-suffering recovery bears only a random relationship to the contingent fee which the plaintiff's lawyer is charging.

These elements of vulnerability cannot be gainsaid. However, the truth remains that pain and suffering damages are understood by participants in the tort system as allowing winning plaintiffs to pay their lawyers. Insurance adjustors explain their payouts in terms of "one-third for the doctor, one-third for the lawyer, one-third for the victim." H. L. Ross, Settled Out of Court___ (1970). Moreover, the availability of pain and suffering damages has taken the urgency away from any call for candid reconsideration of the no-costs rule, at least in its tort law application.

In light of these considerations, a legislature could choose to supplement the liability-division proposal by stipulating that in a Daly case, the plaintiff should be allowed to recover for all his out-of-pocket losses, and also for the amount of a reasonable attorney's fee.[1/] Legislation implementing this proposal would need to set forth a reasonable-fee model for courts to take into account. Here, the decramental regulation of the contingent fee in medical malpractice cases effected in California by AB 1XX is obviously relevant--especially since the complexities of many malpractice cases renders those cases analogous to products cases (which likewise are also rife with complexity.) The contingent fee recommendation

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1/ The "compensation" purpose of damage awards in a tort action could be thought to distinguish tort suits (for attorney's fees purposes) from civil suits generally.

of the California Citizens Commission on Tort Reform can be studied as an alternative possibility. (This recommendation attempts to eliminate what it sees as possible lawyer-disincentive problems created by AB 1XX).

This supplemented proposal does not contemplate court approval of the attorney's fees in every case (as happens in workers' compensation.) The settlement process can continue to operate as it presently does; the parties' awareness of the ultimate rules on the measure of recovery (including attorney's fees) should result in a pattern of settlements which conform to the legal rule here proposed. Also, the "reasonable attorney's fee" amount which the proposal would allow the product plaintiff to recover need not be the actual fee agreed on by the particular lawyer and his client. The fees approved by law could serve as a model, undoubtedly encouraging private-arrangement conformity but permitting flexible private-arrangement variations.

V. Reconciling the Product Plaintiff's Theories in Contributory Negligence Situations

Presently, the plaintiff consumer who is injured by a defective product can sue under a strict liability theory, a negligence theory, or an implied warranty theory. What if the plaintiff is contributorily negligent? In a negligence action, the ordinary rules of comparative negligence apply. In a strict liability action, whatever Daly suggests about liability division applies--and those suggestions are amorphous

enough to create an uncertain possibility that the product plaintiff who can prove negligence will be better off relying on negligence than on strict liability. This would also be true were the Legislature to approve this Report's expanded comparison proposal. Moreover, should the Legislature adopt any of the three proposals set forth above in this Report as alternatives to "comparison" in strict liability situations, cases would necessarily arise in which the careless plaintiff could recover more damages by suing in negligence and incurring a Li reduction in damages than by suing in strict liability and encountering the enacted damage-reducing proposal.

What about implied warranty: what tort defenses are available in an implied warranty action? Given the extent to which strict liability has monopolized personal injury cases in recent years, this is a question in which implied warranty courts have seldom been required to answer. But the case law certainly leaves room for the proposition that tort law's defense of contributory negligence should be deemed completely irrelevant to a claim based on the sales law doctrine of implied warranty. (See p. 2, supra). If this is a correct statement of law, then the Daly holding--asserting contributory negligence as an important damage-reducing factor in strict liability actions--could lead to a resurgence of implied warranty claims on behalf of careless product victims seeking to rely on the one legal theory that would ignore their carelessness in calculating their damages.

All of this seems wrong. The California Supreme Court has properly made clear that strict products liability should be the primary theory in personal injury product accidents. While it has condoned plaintiffs who wish to argue either a negligence theory or an implied warranty theory in addition to strict liability, the basic purposes of strict liability would be thwarted if a plaintiff guilty of contributory negligence could receive a larger recovery under either negligence law or implied warranty law than under strict liability itself. Therefore, even if the Legislature chooses to leave the Daly comparison suggestions undisturbed, the Legislature should at least establish that in an implied warranty personal-injury action, the victim's contributory negligence shall operate to reduce the victim's recovery in a Daly fashion. If the legislature codifies this Report's strict-liability "comparison" proposal, it should render that proposal applicable to implied warranty actions as well. If it enacts any of the three non-comparison proposals, it should render them applicable to all products claims, whether pursued under a negligence, strict liability, or implied warranty theory.

EXHIBIT B

78-450

REPORT TO THE STATE LEGISLATURE'S JOINT COMMITTEE ON TORT LIABILITY

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July 31, 1978

ASSUMPTION OF RISK

SUMMARY

Assumption of risk should be continued (or recognized anew) as a complete defense to a claim in tort.

The defense should apply only when (a) the risk created by the defendant's tortious conduct (or defective product) is necessarily connected to some clear benefit which the plaintiff receives from that conduct (or product) and (b) the plaintiff chooses to expose himself to that risk in order to receive that associated benefit.

Assumption of risk should be excluded, however, if:

(a) the plaintiff decision-maker is less than 18 years old;

(b) the plaintiff decision-maker is intoxicated.

(c) the environment for the plaintiff's decision-making is created by the defendant and is extremely ill-suited for mature decision-making.

(d) the defendant is guilty of willful and wanton misconduct.

(e) the defendant's tortious conduct or product is in violation of a safety statute [The advisability of this last exclusion is uncertain.]

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ASSUMPTION OF RISK

I. INTRODUCTION.

In its true sense, assumption of risk is an affirmative defense to a claim in tort defined in terms of the plaintiff's voluntary exposure of himself to a known risk created by the defendant's tortious conduct. Recent California Supreme Court cases, mainly Li v. Yellow Cab Co.[1/] and Daly v. General Motors Corp.,[2/] have raised serious questions about the current status of assumption of risk in California law. Campbell v. Southern Pacific Co. - a case now pending before the California Supreme Court[3/] - gives the Court an important opportunity to address the assumption of risk issue. This Report will explore the assumption of risk defense. Its conclusions will be that, despite some loose language in Li and Daly, assumption of risk should be retained as a complete defense in tort, but that the defense should be defined narrowly and rigorously so as to exclude it from many of those cases where it has been applied in the past to plaintiffs' detriment.

1/ 13 Cal. 3d 894, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

2/ 20 Cal. 3d 725, 144 Cal. Rptr. 389 (1978).

3/ The Second District's opinion in reported at 124 Cal. Rptr. 496 (1975).

In recent years, assumption of risk has emerged as one of the most difficult and controversial of all tort issues. One reknowned Yale Law School scholar has strongly argued that assumption of risk be entirely banished from the tort system.[4] Yet one of his Yale colleagues has contrastingly argued that assumption of risk is essential to any contemporary scheme of strict liability.[5] In the preparation of the Second Restatement of Torts in the early 1960's, a group of distinguished deans, professors, and jurists came into vivid conflict, in the so-called "Battle of the Wilderness," on the question of whether the defense should be abolished or retained.[6] The American Law Institute chose to accept the counsel of the conservationists.[7] But in the intervening years a growing number of courts have placed themselves in the abolitionist camp.[8] Other courts, however, have tenaciously clung to the assumption-of-risk defense. At least one jurisdiction has compromised by eliminating assumption of risk as a defense in negligence cases while retaining it as a full defense in cases founded on strict liability.[9]

4/ James, Assumption of Risk: Unhappy Reincarnation, 78 Yale L.J. 185 (1968).

5/ Calabresi & Hirschoff, Toward a Test for Strict Liability in Torts, 81 Yale L.J. 1055 (1972).

6/ See the description in Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368, 378 n.3 (Tex 1963).

7/ Restatement of Torts (Second) §§ 495 A - 495 G (1965).

8/ E.g., Williamson v. Smith, 83 N.M. 336, 491 P.2d 1147 (1971).

9/ Farley v. M M Cattle Co., 529 S.W.2d 751 (Texas 1975).

II. BASTARDIZED USES OF "ASSUMPTION OF RISK"

One major problem with assumption of risk is that the phrase itself is often used, in bastardized ways, to refer to tort-law ideas which are quite separate from assumption of risk as properly defined.

Consider, for example, the defendant whose conduct is somewhat risky, but reasonably so; given this reasonableness, the defendant's conduct is not negligent after all. If it is then said that the plaintiff "assumes the risk" of such conduct, all this really amounts to is an observation upon the fact that because the defendant's conduct, although risky, does not contain negligence, the plaintiff will lose his lawsuit. The plaintiff thus "assumes the risk" only in the sense that even if he is injured by the risk he will be lacking in any basis for a successful tort suit. Often, courts are led to say that the plaintiff "assumes the ordinary risks" of the defendant's activity. Now, such "ordinary risks" are quite likely non-negligent, given their "customary" status; thus, these assumption-of-risk cases which refer to "ordinary risks" probably mean nothing more than that the defendant has not been negligent in the first place. (This no-negligence idea is the best explanation for the venerable baseball foul-ball cases; all factors considered, it is simply not unreasonable for a baseball stadium to limit its screen to the area behind home plate.)

Consider, secondly, the plaintiff who signs a contract which includes a clause exonerating the defendant from liability in the event of negligence. It is sometimes said that contractual disclaimers of this sort involve "express assumption of risk." But in several ways such disclaimers do not entail assumption of risk in its true sense. For one thing, there is no requirement that the plaintiff have actual knowledge of the risk created by the defendant's tortious conduct. Indeed, in disclaimer situations the defendant's tortious conduct will often lie in the future at the time the disclaimer is signed--while in the typical true assumption of risk situation, the defendant has already created the risk at the time of the plaintiff's risk-assumption. Finally, if such disclaimers are valid at all, it is because they comprise a valid clause in a valid contract; thus contract law rather than tort law furnishes the doctrine which prevents the plaintiff's lawsuit.

(Yet while liability disclaimers do not involve true assumption of risk, there are certain characteristics which the two matters hold in common. While ordinary contractual provisions can be voided only on the narrow grounds of "unconscionability," tort liability disclaimers will be held invalid if they "affect the public interest" or are contrary

to "public policy."[10/] And the "public policies" which courts take into account are often drawn, in considerable part, from the law of torts.[11/] Consider the retailer who was willing to sell his product at a 10% price discount if the plaintiff will agree to a liability disclaimer. In thinking about whether this disclaimer should be honored, one is led to consider issues which themselves are germain to a proper assumption-of-risk analysis, including the ability of potential victims to make intelligent decisions when faced with "risky" offers of this sort. It is often suggested that tort disclaimers must be cast in "express" language. Yet it is unclear why this should be true. Courts "imply" provisions in contracts all the time in order to honor the evident expectations of the parties. There is no clear reason why, in a appropriate case, a tort disclaimer could not or should not be so implied. And those cases which give rise to an assumption-of-risk defense might involve the kind of facts which could support the idea of an implied contractual disclaimer of tort liability.)

10/ Tunkl v. Regents of University of California, 60 Cal. 2d 92, 383 P.2d 441 32 Cal. Rptr. 3 (1963); Hennigsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

11/ See, e.g., Johnston v. Fargo, 184 N.Y. 379 (1906).

III. ASSUMPTION OF RISK'S RELATIONSHIP TO CONTRIBUTORY NEGLIGENCE

Assumption of risk is often thought to be closely related to contributory negligence. Assumption of risk is characterized by the plaintiff's exposure of himself to a known risk. If this risk-exposure entails "unreasonable" conduct on the plaintiff's part, then his conduct involves contributory negligence as well as assumption of risk, since "unreasonableness" is the basic determinant of contributory negligence. In a large number of cases, the plaintiff's risk-assumption is unreasonable, and the defenses of contributory negligence and assumption of risk hence "overlap." Only, therefore, when the plaintiff's risk-assumption is "reasonable" in character is assumption of risk entirely free of any contributory negligence association. But the idea of a "reasonable" assumption of risk calls for explication. Why would it ever be "reasonable" for a person to confront a known risk? The answer must be that avoiding the risk would require the person to undergo some important detriment or forsake some important benefit. A number of courts, while retaining the assumption-of-risk defense, have attempted to respond to the equities of such "reasonable" risk-assuming situations. In a case in which the plaintiff has been injured by a negligently operated train as he reasonably attempts to rescue a child from the tracks, these courts will hold that since the child's life hung in the balance plaintiff's conduct was not truly "voluntary," and

hence that assumption of risk does not apply.[12/] Yet almost by hypothesis, in every case of "reasonable" assumption of risk, something substantial hangs in the balance. Thus one can appreciate that the more "refined" the courts become in interpreting the "voluntary" requirement of assumption of risk, the more severe the contraction of the coverage of the "reasonable" assumption-of-risk concept. Indeed, some jurisdictions do now hold that a plaintiff "voluntarily" assumes a risk only if there is no "reasonable alternative" to his risky course of conduct;[13/] such holdings seemingly preclude the possibility of an assumption of risk which is both "reasonable" and "voluntary." In other jurisdictions, however, courts continue to insist that only an "urgent necessity" negates "voluntariness":[14/] "Necessity" supports the idea of a "compulsion" of sorts operating against the plaintiff.

But let us now return to cases in which the plaintiff's risk assumption is "unreasonable," leading to the assumption-of-risk contributory-negligence "overlap." When regarded

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12/ E.g., Eckert v. Long Island R.R., 43 N.Y. 502 (1871).

13/ E.g., Bistos v. Red Owl Stores, Inc., 459 F.2d 656 (8th Cir. 1972) (applying South Dakota law).

14/ E.g., Wooten v. White Trucks, 514 F.2d 634 (5th Cir. 1975) (applying Tennessee law).

strictly from the point-of-view of contributory negligence, the assumption-of-risk feature of the plaintiff's conduct may be quite relevant. That the plaintiff's risk-taking was knowing rather than merely careless might well indicate a high degree of imprudence or unreasonableness on the plaintiff's part. Also, if the defendant's negligence occurred first and then was followed by the plaintiff's unreasonable conduct involving a deliberate risk exposure, it becomes possible to say that the plaintiff's negligence was the most "immediate cause" of the accident. In a jurisdiction that has adopted comparative negligence, the greater degree of imprudence associated with assumption of risk will lead to a greater diminution of the plaintiff's damages award. And assuming that comparative negligence allows for the comparison of causation (see my Daly Report), the "immediate cause" feature of the plaintiff's risk-assumption will also serve to reduce the plaintiff's damages.

We can agree, therefore, that in "overlap" situations, an assumption-of-risk feature can strengthen a contributory/comparative negligence claim. But what about the assumption-of-risk feature standing on its own? In the old days, it could be said that in "overlap" cases the assumption-of-risk doctrine was redundant, since the doctrine of contributory negligence provided a complete defense. However, once a

jurisdiction has adopted comparative negligence, this disparagement of assumption of risk is no longer feasible. What happens to assumption of risk after adoption of comparative negligence? A number of comparative-negligence jurisdictions have come to the conclusion that assumption of risk survives comparative negligence as a complete defense.[15/] But other jurisdictions (including--perhaps--California) have suggested that since assumption of risk is only a "variation" of contributory negligence, assumption of risk should be abolished as a complete defense, and "merged" into the more general doctrine of comparative negligence.[16/] So merged, the plaintiff's risk-assumption reduces but it does not eliminate the plaintiff's recovery.

Agreeable as this latter approach may seem at first, it unfortunately contains several analytic defects. First of all, as noted, assumption of risk overlaps contributory negligence only in those cases in which the plaintiff's risk-assumption is "unreasonable." Therefore, to merge assumption of risk into contributory negligence where the assumption of risk

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15/ E.g., Kennedy v. Providence Hockey Club, 376 A.2d 329 (R.I. 1977).

16/ See, e.g., the leading case of McConville v. State Farm Mutual Automobile Ins. Co., 15 Wis. 2d 374, 113 N.W. 2d 14, (1962) (by implication).

overlaps with contributory negligence leaves entirely open the question of what to do with the plaintiff whose risk-assumption is "reasonable" rather than "unreasonable." Given the "reasonableness" of many risk-assumptions, it is analytically impossible to regard them as mere forms of contributory negligence; hence they cannot be subjected to the comparative-negligence damage-reducing process. With "reasonable" assumptions of risk, the defense remains an all-or-nothing matter. On the "all" side, it would seem ludicrous to completely bar the tort recovery by a reasonable risk-assumer while merely diminishing the recovery of an unreasonable risk-assumer.[17/] Yet on the "nothing" side, it would plainly be bootstrapping to abolish "reasonable" assumption of risk as any sort of tort defense merely on grounds that in certain separate applications assumption of risk may overlap with contributory negligence.

Secondly, the general idea that since there is a large overlap between assumption of risk and contributory negligence, assumption of risk must merely be a variation of contributory negligence is obviously shallow and inadequate. One could just as easily (and falsely) say that the existence of this

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17/ See Fleming, Comparative Negligence at Last - By Judicial Choice, 64 Calif. L. Rev. 239, 262 (1976).

overlap establishes that contributory negligence is merely a "variation" of the more general doctrine of assumption of risk! Either of these two "variation" arguments begs the question by assuming that assumption of risk does not have a theory of its own, a theory that is independent from the theory of contributory negligence. (To illustrate the fallacy of equating "overlap" with "variation," assume a merger between Hustler and People Magazines, and assume further that this new periodical, armed with sophisticated photographic equipment, is able to secure photographs of famous couples in the act of making love in their own bedrooms. The publication of these photographs might be illegal on the grounds of obscenity, and also illegal as invasions of privacy. Thus, obscenity and privacy "overlap" in the sense that both doctrines apply to a certain class of cases. No one, however, would conclude that the mere fact of this overlap proves that either the obscenity doctrine or the privacy doctrine is merely a variation of the other).

IV. PRESENT STATUS OF ASSUMPTION OF RISK IN CALIFORNIA LAW

Prior to Li v. Yellow Cab Co., California law recognized the assumption of risk defense in a rather general way.[18/]

18/ See, e.g., Prescott v. Ralphs Grocery Co., 42 Cal. 2d 158, 265 P.2d 904 (1954) (indicating that the plaintiff can assume a risk even while acting with "due care."--i.e., "reasonably".)

Of course, prior to Li any contributory negligence on the part of the plaintiff also barred the plaintiff's recovery. In Li, the Supreme Court, as we all know, replaced the traditional rule of contributory negligence with the more contemporary rule of comparative negligence. Li contains the following discussion of assumption of risk.

> As for assumption of risk, we have recognized in this state that this defense overlaps that of contributory negligence to some extent and in fact is made up of two distinct defenses. "To simplify greatly, it has been observed . . . that in one kind of situation, to wit, where a plaintiff unreasonably undertakes to encounter a specific known risk imposed by defendant's negligence, plaintiff conduct, though he may encounter that risk in a prudent manner, is in reality a form of contributory negligence . . . Other kinds of situations within the doctrine of risk are those, for example, where plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him. Such a situation would not involve contributory negligence, but rather a reduction of defendant's duty of care". . . . We think it clear that the adoption of a system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence. (emphasis added)

This language in Li has been understood by many as abolishing assumption of risk as an independent defense in negligence

cases. But read carefully, the Li language does not go this far. First of all, it clearly preserves assumption of risk in those cases where assumption of risk is somehow-or-other equatable with a "reduction of defendant's duty." (See Professor Fleming's conduct that this "duty" reference "could easily become the means for readmitting the devil through the back door who has just been expelled through the front.")[19/] Secondly, since the "variant of contributory negligence" idea can only apply when the plaintiff's risk-assuming conduct is unreasonable, Li says nothing about assumption of risk where the plaintiff's risk-assuming conduct is reasonable in character. Third, even where the plaintiff's risk-assumption is unreasonable, the Li language at least allows the plaintiff to argue that, given the facts of the situation, this is not one of those "particular cases" in which assumption of risk can properly be regarded as no more than a "variant" of contributory negligence.

19/ See Fleming, supra, at 264. Half a century ago, Professor Bohlen argued that facts which seemingly suggest an assumption of risk can better be understood as "negating the duty" running from the defendant to the plaintiff. Bohlen, Voluntary Assumption of Risk, 20 Harv. L. Rev. 14, 16-18 (1906). The issue, then, is not really assumption of risk, but "duty." This is an unhelpful explanation. As difficult as the issue of assumption of risk may be, the issue of duty is even more confusing. Neither Professor Bohlen nor his adherents have set forth any workable general standards which would allow us to recognize a "duty negation" when we see one. Especially since the entire concept of "duty" is now in strong disfavor within California tort law, translating assumption of risk into a "duty" issue is a very unattractive course of action. Professor Fleming agrees. Fleming, supra, at 264-65.

Luque v. McLean,[20/] decided by the Supreme Court in 1972 (three years prior to Li), deals with the defenses available in a strict products liability action. Luque began by quoting Greenman to the effect that strict liability applies to a "defect . . . of which the plaintiff was not aware." Elaborating on this awareness element in the Greenman reasoning, the Luque Court held that a product is not automatically non-defective simply because its defect is "obvious" or "patent" rather than "latent" in nature. But the Court continued as follows:

> On the other hand, . . . the awareness language in the second Greenman excerpt is not meaningless. It declares in effect that a person urging strict liability must not have assumed the risk of the defective product. . . . Assumption of risk is a defense [which the defendant may allege and seek to prove].

The Court's opinion then proceeded further:

> Ordinary contributory negligence does not bar recovery in a strict liability action. 'The only form of plaintiff's negligence that is a defense to strict liability is that which consists in voluntarily and unreasonably proceeding to encounter a known danger, more commonly referred to as assumption of risk. For such a defense to arrive, the user or consumer must become aware of the defect and dnager and still proceed unreasonably to make use of the product.'

20/ 8 Cal. 3d 156, 501 P.2d 136, 104 Cal. Rptr. 443 (1972).

These paragraphs from Luque resolved two issues, but left a third issue open. (1) Where the plaintiff's contributory negligence contained no advertant risk-assuming element, under Luque it constituted no defense at all. (2) In the area of "overlap" between contributory negligence and assumption of risk, the plaintiff's conduct furnished a full defense. (3) But what about assumption of risk in areas outside the overlap--i.e., where the plaintiff's risk-assuming conduct is reasonable rather than unreasonable? This is the issue which Luque treated ambivalently. The first of the Luque excerpts (above) seemingly established assumption of risk as a general defense in strict liability, while the second excerpt seemingly endorsed the defense only when the plaintiff's risk-assuming conduct contained an unreasonable element.

Li, by converting the traditional contributory negligence rule into the modern rule of comparative negligence, obviously required a reassessment of the Luque rulings. That reassessment came in the Supreme Court's recent decision in Daly v. General Motors Corp. In a dramatic way, Daly extends the new rule of comparative negligence to strict liability actions. Luque had in essence bifurcated contributory negligence into a pair of rules; Daly re-unifies contributory negligence. That is, all forms of the plaintiff's unreasonable conduct--when regarded from the vantage point of contributory negligence--function

to reduce the plaintiff's damages but not to eliminate his recovery altogether. The Daly opinion passes to

> note one important and felicitous result if we apply comparative principles to strict product liability. Under Li, . . . "assumption of risk" is merged into comparative principles. . . . The consequence is that after Li in a negligence action, plaintiff's conduct which amounts to "negligent" assumption of risk no longer defeats plaintiff's recovery. Identical conduct, however, in a strict liability case acts as a complete bar under rules heretofore applicable. . . . The application of comparative principles to strict liability obviates this bizarre anomaly by treating alike the defenses to both negligence and strict products liability actions. In each instance the defense, if established, will reduce but not bar plaintiff's claim.

This passage from Daly perpetuates and carries forward all the ambiguities that inhere in Li. Daly, like Li, fails to clarify under what circumstances a plaintiff's risk-assumption can diminish the defendant's duty. Daly's reference to the plaintiff's "negligent" assumption of risk leaves open what the effect is of an assumption of risk which is reasonable rather than negligent in character. And by relying on Li, Daly leaves some room for the argument that even a negligent assumption of risk should not in the particular case be disparaged as a mere variant of contributory negligence.

Despite these qualifications, under the Li-Daly combination the assumption of risk defense would appear to be in clear retreat in California law. This appearance is what makes Walters v. Sloan[21/] so interesting. Walters was decided by the Supreme Court in November, 1977 (several months prior to Daly). In Walters, a police officer had been injured when he had attempted to arrest a minor who was intoxicated in public. The officer then sued the homeowners who had fed the minor his alcohol in the first place. The Supreme Court was willing to assume for argument's sake that this conduct on the part of the homeowners could be actionably negligent. (Cf. the Court's later decision in Coulter.) Nevertheless, the Court denied the plaintiff any recovery, relying on a "policeman" extension of the "fireman's rule" which had previously existed under California law. "The fireman's rule provides that negligence in causing a fire furnishes no basis for liability to a professional fireman injured fighting the fire." Firemen, "whose occupation by its very nature exposes them to particular risks of harm, cannot complain of negligence in the very occasion for [their] engagement." In affirming and indeed extending the fireman's rule, Justice Clark's opinion for the five-person majority (Justices Mosk, Richardson, Wright, and Sullivan all concurred in the Clark opinion) explained that "the fireman's

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21/ 20 Cal. 3d 199, 571 P.2d 609, 142 Cal. Rptr. 152 (1977).

rule is based on a principle as fundamental to our law today as it was centuries ago. The principle is not unique to landowner cases but is applicable to our entire system of justice--one who has knowingly and voluntarily confronted a hazard cannot recover for injuries sustained thereby. We have consistently applied this doctrine in our other recent pronouncement in other cases of basic tort doctrine"--and here the Court alludes to both Luque and Li.

This paragraph in Walters is intriguing, to say the least. Only once does the Walters opinion anywhere mention the "assumption of risk" phrase. Yet it is clear that the "fundamental principle" on which the Walters Court has relied is the assumption-of-risk principle, and that the rule of law which the Walters Court states is the assumption-of-risk rule. And in articulating that rule the Court does not limit the rule to "unreasonable" or "negligent" risk confrontations; any knowing and voluntary confrontation will suffice. (Indeed, there is nothing in the facts of either Walters or the typical fireman's case which seriously suggests any unreasonableness in the policeman's or fireman's conduct.)

In Campbell v. Southern Pacific Co., now pending before the Supreme Court, an employee's supervisor ordered the employee to drive a tractor. Another employee told this employee that the tractor was having problems with its power steering.

The employee testified that he then asked the supervisor about the power-steering problem, and that the supervisor denied that any such problem existed. The supervisor disputed that this conversation took place; but the supervisor agreed that he had "assigned" the employee to the particular tractor. The employee then suffered an injury while driving the tractor, and eventually sued the tractor manufacturer. The trial judge refused to instruct the jury on assumption of risk, and the jury returned a plaintiff verdict. The Court of Appeal reversed this verdict, concluding that the judge erred in refusing to give the jury an assumption-of-risk instruction.

> From the above evidence the jury could have concluded that Campbell knew [the] tractor was red-tagged for power-steering trouble, that he did not object to his supervisor's order to drive the tractor, that he felt sloppiness in the steering system, and that he voluntarily assumed the risk of a power-steering mishap. Although juries are often reluctant to find that plaintiff has assumed a particular risk . . . . . defendant is nevertheless entitled to take its theory of the case to the jury. . . . Whether Campbell felt compelled to drive [the] tractor and whether he appreciated the particular risk arising from such driving were questions of fact.

The Court of Appeals decision was in September, 1975. The Supreme Court granted a hearing, heard oral argument,

and eventually asked for reargument on June 17, 1977. (Daly was reargued on the same day.) The Supreme Court's eventual opinion in Campbell can be expected to examine the assumption of risk ambiguities left open by the combination of Li, Daly, and Walters. Since the facts on assumption of risk in Campbell are quite weak (see p. 29 infra), the Campbell Court might be led to abolish the assumption-of-risk defense in a categorical way. This would be a mistake.

V. A PROPER ASSUMPTION OF RISK DOCTRINE

In my view, there should be a doctrine of assumption of risk that would function as a complete defense to an action in tort, whether the action is based in negligence or strict liability. However: the doctrine should be narrowly and rigorously defined. Given the limits of this definition, the defense would not be available in many of the cases where the defense has been deemed available in the past. Assumption of risk should be recognized as a defense only when (a) the risk created by the defendant's tortious conduct (or defective product) is necessarily connected to some clear benefit which the plaintiff receives or hopes to receive from that conduct (or product), and (b) the plaintiff in fact chooses to expose himself to that risk in order to secure that associated benefit. In these circumstances, and probably in these circumstances only, should the assumption-of-risk defense be recognized. Several illustrations of proper applications of this defense are offered below.

A. Montgomery Ward sells its regular model power mower for $150, but offers as an option a safety feature--a "deadman control" device--[22/] which adds $20 to the purchase price. The plaintiff, in buying the power mower, declines to purchase this option because he does not want to pay its cost. The plaintiff then suffers an injury which would have been prevented had the deadman control device been present. Later, the plaintiff sues Montgomery Ward for selling a defective product. In this suit, a jury would be willing to conclude, under Barker, that the absence of the deadman control device renders the power mower defective. Nevertheless, the fact remains that the plaintiff chose to encounter the risk in order to achieve the cost saving which this risk-encounter made possible. The plaintiff should therefore lose his lawsuit, for reason of his assumption of risk.

B. Montgomery Ward's power mower cost $150, Sears' cost $170. These power mowers are very similar, except that the Sears' includes a deadman control device--which accounts for most of the price difference between the Montgomery Ward's

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22/ This device stops the blades of a power mower whenever the operator releases the mower's handle. It therefore prevents against finger amputations as the operator tries to clear out the mower's discharge shute. See Lawn Mowers-Safety vs. Utility, Consumer Reports, July, 1978 pp. 387-88.

This illustration is a "hypothetical:" power mowers do not yet include such a control device.

and the Sears' products. Plaintiff, knowing of this safety differential, buys the Montgomery Ward's mower in order to save money. Plaintiff then suffers an injury which would have been prevented by the Sears' deadman control device. Plaintiff sues Montgomery Ward, alleging its sale of a defective product. Once again, the jury would be willing to find defect. The plaintiff's lawsuit should be barred by assumption of risk.

C. A person smokes a certain brand of cigarettes. He does so because of the keen pleasure which cigarettes provide. Evidently that pleasure is brought about by cigarette ingredients (nicotine and tar) which can also cause cancer--as the plaintiff well knows. After smoking for many years, plaintiff acquires cancer and sues the cigarette manufacturer. Under the Barker burden-of-proof rule, there is at least a presumption that the cigarette has been defectively designed. Nevertheless, the plaintiff's lawsuit should be barred by assumption of risk.[23/] At least for the immediate future, the hazard in cigarettes is an inevitable by-product of the very ingredients in cigarettes which gives the smoker the pleasure which leads him to smoke in the first place.

23/ See Bronson v. Club Comanche, Inc., 286 F. Supp. 21 (D. Virgin Islands 1968).

D. A person has a medical problem for which ordinary medicine offers no more than a partial cure. He goes to an unlicensed doctor who practices medicine in an unorthodox way disapproved of by the American Medical Association. The person knows that by accepting this doctor's treatment, he will be losing the benefits of traditional medical care. He nevertheless chooses to experiment, in the hope that the unlicensed doctor's unorthodox method of treatment will be effective. This is a hope necessarily tied to his forsaking of traditional medical care. The unorthodox treatment produces no results (or adverse results), and the plaintiff sues the doctor for malpractice. The plaintiff's lawsuit should be barred by assumption of risk.[24/]

E. A fireman is injured by a fire negligently set. Firemen, as a class, greatly benefit from negligent fires. Most fires involve negligence in their creation; without negligent fires, there would be little need to hire firemen. The injured fireman has chosen a career in firefighting over other possible careers, in light of the excitement of fire-fighting as well as its satisfactory salary levels. The fireman sues the party whose negligence was responsible for the fire. The fireman's suit should be barred by assumption of risk. (This analysis of course supports the fireman's rule affirmed in Walters v. Sloan. Dissenting in Walters, Justice Tobriner points out that no rule bars a highway maintenance worker (or, one might add, a salesman traveling on a highway)

24/ See Nelson v. Dahl, 174 Minn. 574, 219 N.W. 941 (1928).

from recovering for injuries caused by a third party's negligent driving. Such a person may benefit from the existence of a highway system; but he receives no benefit from the negligent driving of any other motorist. The fireman and salesman situations are thus fundamentally different for assumption-of-risk purposes.)

In these lawsuits mentioned above, not only should the defendants prevail, but these results should be explained in terms of assumption of risk rather than of any other legal doctrine. The issue of contributory negligence certainly does not explain the results. First of all, if the matter were merely one of contributory negligence, under comparative negligence the plaintiff could still receive a substantial recovery. In any event, there is nothing in any of the examples which suggests that the plaintiff has behaved unreasonably or carelessly; and nothing in the logic of the examples seeks to discourage the plaintiff from engaging in his conduct or to penalize the plaintiff because of that conduct. Contributory negligence is therefore not the issue at all.

Nor is the real issue the absence of negligence (or defect) or the absence of "duty." To be sure, in Example A it is possible to say that the behavior of the manufacturer was reasonable, given the choice which the manufacturer gave the plaintiff. However, as we all know, the emphasis in strict

liability is on the defectiveness of the defendant's product, not the reasonableness of its conduct. In any event, even if the manufacturer's conduct is thought reasonable, it only achieves this "reasonable" status because of the element of choice which it confers on the plaintiff. Since the plaintiff's choice is therefore the key to the example, assumption of risk is the most appropriate way to express the example's result. The idea of no negligence--or no "duty"--seems even less adequate as applied to Sears in Example B, since in that example the power of choice enjoyed by the plaintiff was due not to any particular effort on the defendant's part, but rather to the general operation of the marketplace. In Example D, it would be absurd to say that the disapproved medical treatment cannot be deemed negligent, or that the doctor owes no "duty" to his own patient. In Example E, the party responsible for the fire has been negligent by hypothesis, and can be sued by any of the fire's ordinary victims. And I know of no coherent definition of "duty" which would support the idea that--assumption of risk apart--the fire-setter owes no "duty" to the fireman.

(English law has taken the view that in order to establish assumption of risk, the plaintiff's conduct must entail not only an implied acceptance of the risk itself, but also an implied acceptance of the legal liability respecting that risk.

Unfortunately, the English case law has failed to make clear, either by way of general definitions or helpful specific examples,[24a/] what is covered by this concept of implied acceptance of liability. The English rule might help explain the pro-defendant results in Examples A and D above. But it seems indeterminate in its application to the other examples, and also in its application to several of the examples to be set forth in Part VII below. I am, therefore, unpersuaded by Professor Fleming's recommendation that California follow the English model.)

VI. JUSTIFICATIONS FOR AN ASSUMPTION-OF-RISK DEFENSE

In Examples A and B, it was assumed that a jury could find the power mower defective because of the absence of the deadman control device. Why, then, should the law bar the plaintiff's lawsuit? Under Barker the jury judges the product defective because it concludes that the risks inhering in the absence of the safety device outweigh the benefits associated with that absence (in this case, the product's reduced cost to the plaintiff.) But the plaintiff, in making his knowledgeable purchase, reveals his view that from his vantage point the benefits do exceed the risks. The slogan of assumption of risk might well be: "Let the plaintiff decide."

24a/ See, e.g., Imperial Chemical Industries v. Shotwell, [1965] A.C. 656.

The idea behind assumption of risk is that in certain classes of cases, insofar as the defendant's conduct (or product) runs a risk to the plaintiff, the plaintiff may be in a better position than the jury to determine whether that risk is adequately justified. Given the way in which the plaintiff has exercised his power of choice, it appears that the defendant's risk-taking, vis-a-vis the plaintiff, is something which tort law should neither disapprove of nor seek to discourage. There is thus a utilitarian explanation for assumption of risk: the risk-taking that runs between the defendant and the plaintiff is, given the implications of the plaintiff's choice, not the kind of risk-taking which society should seek to prevent.[25/] But there is also a humanistic explanation for assumption of risk. The plaintiff having made a choice which reveals his satisfaction with the defendant's conduct, our respect for the plaintiff as a full human decision-maker requires that we regard the plaintiff's revealed satisfaction as decisive.[26/] Ironically, our respect for the plaintiff as an individual requires us to deny his lawsuit.

25/ See R. Posner, Economic Analysis of Law 72-73 (1st ed. 1973).

26/ Cf. Mansfield, Informed Choice in the Law of Torts, 22 La. L. Rev. 17 (1961).

These justifications for assumption of risk do assume that there can be a discrepancy between how the plaintiff evaluates the defendant's risky enterprise and how the jury (absent the plaintiff's choice) would evaluate that same enterprise. What are the possible explanations for any such discrepancies? There are several. (1) The plaintiff may be someone who is more willing than the average person to take risks when the risks contain potential benefits. For example, the plaintiff may be the kind of person who, were he an investor, would be inclined to buy on margin or sell short on the stock market. There is nothing wrong with such "favorable" attitudes towards risk-taking--even though the jury may have a more average-person attitude.[27/] (2) The actual risk occasioned by the defendant's act may in part be a function of how careful the plaintiff is in his own conduct or in his handling of the defendant's product. (The deadman control device, for example, may not be necessary for the person who operates a power mower with care and skill in the first place.) For the plaintiff who correctly perceives that he is more careful or skillful than the average person, the ratio between benefits and risks arising out of the defendant's conduct/product

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27/ See R. Posner, supra.

may be more favorable than the ratio is for the average person. (3) Even assuming no divergence between the values and skills of the plaintiff and those of the average person, the plaintiff's evaluation of the risk/benefit ratio may be more accurate or trustworthy than that of the jury. The jury is, after all, an amateur ad hoc group which looks at matters through the distorting lens of hindsight.

VII. WHEN THE ASSUMPTION-OF-RISK DEFENSE DOES NOT APPLY.

The rationale for assumption of risk offered above would justify the defense in a limited number of cases, of which examples have been given above. What is important, however, to recognize is that the rationale does not support the defense in the vast majority of cases in which the defense has in fact been traditionally invoked as grounds for denying the plaintiff any recovery. Examples of such improper applications are given below.

A. An employee is assigned to use a machine which the employee knows contains a danger or defect.[28/] It stretches the imagination to find any benefit, economic or otherwise, which the employee receives as a real result of this product defect. The most one can possibly say is that--relying on very simplified economic assumptions--the employee's wages, in light of the hazards of his work assignment, may be marginally higher than

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28/ See Campbell itself, and many other cases of a Campbell sort.

they otherwise would be. But even should this be so, a jury would be properly unwilling, absent special evidence, to believe that the employee exposed himself to the machine (and its risks) for the purpose of securing this marginal wage increment. Rather, he subjects himself to the machine in order to keep his job. And in all likelihood that job is more desirable to him than other jobs for a number of factors unrelated to any marginal wage increment. These factors include job security (including retention of seniority rights), wage levels (apart from any risk premium) opportunities for advancement, the ease of commuting from home to work, fringe benefits, the interestingness of the work, and the congeniality of one's fellow workers.[29/] The assumption of risk defense defined in this Report should not be applied in such a case.

B. The buyer of a car, having driven the car for a period of time, realizes that its steering mechanism is working improperly. The car owner has a friend who knows of this also. The two of them take a drive together in the car, wanting to go from one location to another.[30/] Their taking of this trip may be unreasonable; if so, their products liability recovery can be appropriately reduced as a matter of comparative negligence under Li and Daly. But the doctrine of assumption of risk

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29/ See A. Rees, The Economics of Work and Pay 97 (1973).

30/ See Sperling v. Hutch, 10 Cal. App. 3d 54, 88 Cal. Rptr. 704 (4th Dist. 1970).

should not bar their recovery altogether. As for the car owner, the only possible benefit he may have received as a result of the product defect is a marginally lower purchase price, associated with the less extensive quality control program of the particular manufacturer. But absent special facts, it would be hard to believe that the owner had bought this car from this manufacturer for the reason of this marginal cost saving. The case of the friend is even easier. It is hard to identify any benefit which the friend has received that is necessarily tied to the car's defect; and certainly the friend has not chosen to ride in the car because of any such benefit. Neither the owner nor the friend should be barred from suing by the assumption-of-risk doctrine.

C. The plaintiff's next-door neighbor owns a vicious dog which trespasses upon the plaintiff's property. The plaintiff, aware of all this, does nothing about it, not even complaining to the defendant. Several days later, he is severely bitten.[31/] This plaintiff has received no benefit from the presence of the vicious dog; therefore, he should not be subjected to the assumption-of-risk defense. Conceivably, his docility as a neighbor may entail contributory/comparative negligence.

31/ Marshall v. Ranne, 493 S.W.2d. 535 (Tex Ct. Civ. App. 1973).

D. The defendant, in sponsoring a National Lap Sitting Contest, furnishes a chair which is unreasonably and negligently frail. The plaintiff, who knows of the chair's frailty, suffers an injury when the chair breaks while fourteen women college-students are sitting on his lap.[32/] In this case, the plaintiff receives a significant benefit (or pleasure) from the defendant's general activity--the running of the contest. But the plaintiff receives no identifiable benefit/pleasure from the negligently risky aspect of this activity (the frail chair). There may be contributory/comparative negligence, but there should be no assumption of risk.

E. The plaintiff accedes to the defendant's request that the plaintiff help the defendant pull down a tree located on the defendant's land. The technique the defendant chooses to fell the tree is unreasonably risky; this technique the plaintiff perceives upon his arrival. In helping bring down the tree, the plaintiff suffers an injury.[33/] Perhaps one can say that the plaintiff receives some "altruistic" benefit in being allowed to provide assistance to his neighbor; but there is nothing to suggest that he receives any benefit from the unreasonable technique which the defendant has selected.

32/ Wyly v. Burlington Industries, Inc. 452 F.2d 807 (8th Cir. 1971) (applying Texas law).

33/ High v. Coleman, 215 Va. 7, 205 S.E.2d 408 (1974).

F. A tennis pro plays on a synthetic tennis court which is in a defective condition. As a result of the defect, she severely injures her knee.[34/] Bubbles on the tennis court's surface presumably made her aware of the hazard at the time she started playing. The tennis pro may well benefit from the availability of artificial surfaces. But it is hard to see how she receives any benefit from the defective nature of this artificial surface, and impossible to believe that she is playing tennis at this particular time and location in order to secure that benefit.

G. At this point, there is a need to reconsider the facts in Example B (among the "proper" assumption of risk applications.) That Example presupposed a consumer who bought a Montgomery Ward's product rather than a Sears' product in order to achieve the cost saving which the absence of the safety device of the Montgomery Ward's product made possible. So long as this explanation of the plaintiff's purchasers is accurate, application of the assumption-of-risk defense is proper. Note, however, that if all we know is the fact of the Montgomery Ward's purchase, we cannot infer from that fact, standing alone, that the consumer's motive for his purchase was to achieve the cost saving made possible by the lacking safety device. There are, in truth, any number of differences between the Sears' and Montgomery Ward's products in addition to the safety device/$25

34/ Heldman v. Uniroyal, Inc., 53 Ohio App. 2d 21, 371 N.E.2d 557 (1977).

combination. If any of these other differences chiefly motivated the plaintiff's purchase, there would be no basis for applying assumption of risk. In certain product situations, a safety-device/cost-saving combination may be so dominant as to explain, standing alone, the buyer's purposes. Consider two brands of bottled grape drink, X and Y, costing 10¢ and 25¢ a bottle, where the price difference is almost entirely explained by the fact that one manufacturer but not the other is now utilizing shatterproof bottles.[34a/] Given this huge difference in price and the general similarity of products like grape drink, if the plaintiff buys the 10¢ drink rather than the 25¢ drink a jury could easily conclude that the plaintiff did so because he was unwilling to expend for additional safety protection. Given, by contrast, the slighter price difference between the Montgomery Ward's and Sears' products and the greater number of important differences between those products, the sheer fact of the plaintiff's purchase is much less suggestive of why that purchase was made. Since assumption of risk is an affirmative defense for the defendant to allege and prove, in the power mower case it will be the defendant's burden to establish with credible (although perhaps circumstantial) evidence that the safety-device/$25 combination really helps to explain why the plaintiff decided to purchase the Montgomery Ward's product.[34b/]

34a/ See R. Posner, supra.

34b/ Of course, there may be several motives for the plaintiff's decision. It should be enough for assumption-of-risk purposes if the desire to secure the risk-associated benefit played a significant part in that decision.

VIII. DOES THE PROPOSED ASSUMPTION OF RISK DEFENSE GO TOO FAR? CRITICISMS, AND POSSIBLE MODIFICATIONS.

Given the justifications offered on behalf of the proposed assumption of risk rule, narrow as that rule is it is not impervious to some criticism. Particular lines of criticism suggest the possibility of the selective modification of the proposed rule. The justifications spoke in terms of giving appropriate effect to the plaintiff's risk-assuming decision. The assumption behind the justifications is that the plaintiff has made a mature, responsible decision to encounter the risk. The various lines of criticism suggest particular ways in which this assumption of maturity in decision-making may be inapt.

A. Certainly, a mature, adult decision presupposes a mature, adult decision-maker. For this reason, it is probably necessary to exempt children from the coverage of the assumption-of-risk rule. Eighteen is now the legal age of majority in California--the age at which young people are legally allowed to make contracts, acquire property, vote, and so on. If eighteen is the age at which California regards young people as having the power to make decisions with legal implications, then eighteen should also be the cut-off age for assumption of risk. The assumption-of-risk defense

should therefore not be available when the victim is less than eighteen.[35/] (If the victim's conduct is arguably unreasonable, on the contributory negligence issue his youth will be considered as a relevant mitigating circumstance in ascertaining (1) whether his conduct does indeed involve contributory negligence, and (2) under comparative negligence, what proportion of fault should be assigned to him.)

Similarly, since assumption of risk anticipates a mature and sober decision, the defense should not be applied when the plaintiff has made his risky decision while intoxicated. (Of course, intoxication greatly strengthens a contributory negligence claim.)

B. The "environment" in which the plaintiff makes his risk decision[36/] may be poorly conducive to mature decision-making. Consider an amusement park attraction which subjects its participants to a certain risk, but where "there would [be]

35/ Under present California law, only children of "very tender years" have been exempted from assumption of risk. See Barker v. City of Los Angeles, 57 Cal. App. 2d 742, 135 P.2d 176 (1943) (three-year-old plaintiff).

36/ See Twerski, Old Wine in a New Flask - Restructuring Assumption of Risk in the Products Liability Era, 60 Ia. L. Rev. 1, 23 (1974).

no point to the whole thing, no adventure about it, if the risk had not been there."[37/] This seems at first a strong case for assumption of risk: the risk is closely tied to a benefit, and the plaintiff is willing to encounter that risk in order to secure that benefit. Nevertheless, the plaintiff's decision to take the amusement park ride will usually be made on the spur of the moment and in the extreme hurly-burly of the amusement park environment. In such a situation, it may be doubtful that the plaintiff's risk-assuming decision is the kind of mature decision which the assumption-of-risk rule presupposes. Especially since this environment is under the control of the defendant amusement-park operator, it may be appropriate to reject the assumption-of-risk defense. This "environmental" limitation on the defense should be defined tightly, however, to prevent it from being an argument which the plaintiff will be able to assert, as a way of complicating the issue, in every assumption-of-risk case One can formulate the modification as follows: The assumption of risk defense should be unavailable if plaintiff was required to make his risk decision in a defendant-created environment which is extremely ill-suited for responsible decision-making.

37/ Murphy v. Steeplechase Amusement Co., 250 N.Y. 479, 166 N.E. 173 (1929) (defense applied).

C. It can be argued that people are quite likely to "err" in making decisions in favor of encountering risks. Professor Calabresi notes the psychological tendency to believe that accidents happen only to "the other guy;"[38/] Professor Gerald Dworkin refers to the difficulty people experience in translating their "intellectual knowledge" about risks into knowledge that is "subjectively genuine."[39/] If these tendencies are regarded as accurately describing human conduct in general, then the utilitarian justification for assumption of risk would be thrown into doubt: a policy of "paternalism" might do a better job at achieving appropriate accident prevention than a system which allows individuals to make up their own minds--and thereby make mistakes. I am on record as agreeing that the tendencies noted by Professors Calabresi and Dworkin can be found at work in some human conduct.[40/] But I do not believe that these tendencies mar or characterize the conduct of most people most of the time. After all, most persons usually drive their cars safely, and usually cross streets safely. Since the Calabresi and Dworkin suggestions fail as generalizations, they are not adequate to undermine the assumption-of-risk defense in any general way. In any event, they seem relevant mainly to the utilitarian justification for the defense.

38/ G. Calabresi, The Costs of Accidents, 55-57 (1970).

39/ Dworkin, Paternalism, in Morality and The Law, 107, 120-22 (R. Wasserstrom ed. 1971).

40/ See Schwartz, Contributory and Comparative Negligence: A Reappraisal, 87 Yale L.J. 697, 716 (1978).

If the defense's rationale is understood in humanistic terms, the fact that individuals might err in their risk decisions could be deemed irrelevant; the humanistic principle of individual choice could easily be understood as holding that the right to choose includes the right to make a wrong decision.

D. There is, however, a fall-back or intermediate position. In an ordinary case, the conclusion that the defendant's conduct is negligent (or its product defective) is reached merely by a lay jury often on the basis of conflicting and complicated evidence; a particular jury's determination is sufficiently inauthoritative that it is not even admissable as evidence (let alone binding as precedent) in any later case raising the same negligence (or defect) issue. In such circumstances, society's evaluation of the inappropriateness of the defendant's risk-creation is a rather "soft" evaluation which can properly be subordinated to any knowledgeable and voluntary assumption of risk by the plaintiff. In other cases, however, it may be fair to say that society is utterly convinced of the inappropriateness of the defendant's risk. The stronger society's conviction in this regard--the more "conclusive" its judgement that the defendant's risk is inappropriate--the less willing society (via its legal system) should be to believe that the defendant has acted intelligently and consistently with his self-interest in choosing to encounter the particular risk.[41/] At some point, the utilitarian

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41/ See Mansfield, supra.

justification for assumption of risk simply fades in the presence of the enormity of the defendant's risk. And at some point, even the humanist would be willing to intervene in order to protect an individual against pro-risk decisions on his part that seem so clearly unsound. For reasons of this sort, the proposed rule could be modified by excluding it from cases involving the defendant's "willful and wanton misconduct."[42/] Moreover, if there is a statute prohibiting certain defendant conduct, that statutory prohibition can be read as expressing a society's strong judgement--rendered by its legislative agency--about the inappropriateness of the defendant's risk. Arguably, therefore, assumption of risk should be no defense when the plaintiff's claim of negligence (or defect) is based on the defendant's statutory violation.[43/] Many of us, however, are somewhat skeptical of the thoroughness and thoughtfulness of legislative deliberations; we would be less inclined to infer a strong societal conviction from the mere fact of a statutory enactment.

42/ Under existing California Law, assumption of risk is a defense even when the defendant's "misconduct" is "willful and wanton." Lee Ching Yee v. Dy Foon, 143 Cal. App. 2d 129, 299 P.2d 688 (1st Dist. 1956).

43/ Under present California law, the defendant's statutory violation negates assumption of risk. Finnegan v. Royal Realty Co., 35 Cal. 2d 409, 218 P.2d 17 (1950). But this is a position which most other jurisdictions have declined to accept. See Restatement (Second) of Torts § 496 F, comment e.

EXHIBIT C

78-495

REPORT TO THE JOINT LEGISLATIVE COMMITTEE ON TORT LIABILITY OF THE CALIFORNIA LEGISLATURE ON THE PROBLEMS ASSOCIATED WITH AMERICAN MOTORCYCLE ASSOCIATION v. SUPERIOR COURT

By

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LIST OF RECOMMENDATIONS

Recommendation 1: (Section 8)
(1) Statutory confirmation of "pure" comparative negligence, and
(2) Adoption of the modified set-off formula in Section 3 of the Uniform Comparative Fault Act;

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(1) Apply "comparative negligence" to claims based on strict liability, and
(2) Include "recklessness" and "willful misconduct," short of intentional injury, among the kind of fault capable of reducing, but no longer necessarily barring recovery;

Recommendation 3: (Section 26)
Retention of the "joint and several" liability rule even where the plaintiff contributed to his injury through his own fault;

Recommendation 4: (Section 30)
Statutory enactment of contribution by shares proportioned to fault in lieu of the existing system of contribution "pro rata" (equal shares);

Recommendation 5: (Section 37)
Abolition of the "joint judgment" requirement for contribution;

Recommendation 6: (Section 42)

The share of any insolvent or absent tortfeasor shall be distributed among the remaining defendants and the plaintiff (if at fault) in proportion to their respective shares of responsibility;

Recommendation 7: (Section 49)

A release entered into by the plaintiff and a tortfeasor shall discharge the latter from all liability for contribution, but the plaintiff's claim against the remaining tortfeasors shall be reduced by the amount of the released tortfeasor's share of the loss;

Recommendation 8: (Section 67)

(1) In the case of a work injury caused by the concurrent negligence of the worker's employer and a third party

(a) The employer should be allowed to recover from the third party any part of his compensation liability that exceeds his notional share of the tort damages, and

(b) The third party should be allowed to claim contribution to the extent of the employer's share of fault or the employer's workmen's compensation liability, <u>whichever is the smaller</u> (Section 65);

(2) If the employee's negligence occurred with that of the third party, his negligence

should be imputed to the employer so as to reduce his claim to reimbursement (Section 70)

(3) Alternatively, the employer's right of reimbursement should be abolished, regardless of whether he was negligent or not, but the third party's tort liability should be reduced by the amount of workmen's compensation paid or payable to the employee (Section 67).

I. COMPARATIVE NEGLIGENCE

1. In Li v. Yellow Cab Co.[1] the Supreme Court of California abandoned the all-or-nothing common law doctrine of contributory negligence in favor of comparative negligence, so that a contributorily negligent claimant was no longer necessarily completely barred from recovery but merely suffered a reduction of damages in proportion to his own share of negligence for his injury. By this decision, California joined a spectacular trend in recent years which to date has brought 32 jurisdictions in the United States to adopt some version of comparative negligence.[2] The introduction of comparative negligence has encountered an overall favorable response, ranging from enthusiasm to, at least, acquiescence. While the Li decision has been criticized on the ground that the reform was an essentially legislative task,[3] it is now obviously too late to assert a legislative priority. It would be desirable, however,

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[1]13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

[2]See generally Schwartz, Comparative Negligence (1974); 1978 Supp.); Woods, Comparative Fault (1978).

[3]E.g., dissenting opinion by Clark J. See my vindication in Foreword: Comparative Negligence at Last--By Judicial Choice, 64 Calif. L. Rev. 239, 273-83 (1976) [cited hereafter Foreword]. For a critical view of the Court's handling of the Civil Code (§1417) see Englard, Li v. Yellow Cab Co.--A Belated and Inglorious Centennial of the California Civil Code, 65 Calif. L. Rev. 4 (1977). Besides California, Florida, Alaska and Michigan adopted comparative negligence judicially, in all cases after a lengthy justification for judicial activism: see Hoffman v. Jones, 380 S.2d 431 (Fla. 1973); Katz v. State, 540 P.2d 1037 (Ala. 1975); Kirby v. Larsen, 256 N.W. 2d 400 (Mich. 1977).

to include a statutory statement of comparative negligence in a comprehensive statute recommended in this Study.

2. "Pure" Comparative Negligence. The only really controversial aspect of the Li decision was the Court's choice of the "pure" form of comparative negligence in preference to the "Wisconsin rule" which enjoys overwhelming following among the statutes in other states[4] and the qualified recommendation of the defense lobby.[5] Under the "pure" version, a plaintiff may recover some damages, however great his proportion of fault compared with the defendant's, whereas under the Wisconsin rule, a plaintiff can recover only if his negligence is less than the defendant's or, under a more favorable variant, is no greater than the defendant's[6]--in the first case his share must not exceed 49%, in the latter 50%.

The "Wisconsin" 49% rule is especially prejudicial to plaintiffs because it will continue to bar recovery by either party in the great number of automobile collisions where fault is found to be equal in the absence of any "finer tuning." This likelihood is compounded by the practice rule in some states requiring that the jury be kept in ignorance as to the legal consequence of a finding of 50% liability.[7] Its harshness is further increased by the rule

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[4]See Schwartz (supra n. 2) Section 3.5; Woods (supra n.2) Section 4.3.

[5]See the Defense Research Institute's position papers, endorsed by the IAIC, FIC and AIA, Responsible Reform (1969) 23 and its successor, Responsible Reform--An Update (1972) 15.

[6]Pioneered in N.H., this version gained increased attention as the result of its adoption by Wisconsin in 1971. It has since been adopted in Connecticut, Montana, Nevada, New Jersey and Texas.

[7]See Foreword (supra n. 3) at 245, n. 26.

in some states requiring a comparison between the plaintiff's fault and each defendant's separately, so that if the plaintiff's share is less than the defendants' aggregate, but more than that of each defendant separately, he still fails to recover.[8] The other variant--the "50% rule"--which was pioneered by New Hampshire in 1969 and gained attention especially after Wisconsin switched to it in 1971, disqualifies only plaintiffs whose fault was greater than the defendant's so that, at least in the common case of equal fault, both parties can still recover an aliquot share from each other.

3. Proponents of the "49%" and the "50%" rules invoke the moral argument that it is unjust to permit a party who is more at fault to recover anything from another less culpable. This becomes the more plausible when the party with greater fault also happens to suffer the greater injury. Suppose the fault ratio in a collision between "A" and "B" was 25%:75%, while "A's" damage totalled $1,000 and "B's" $5,000. Is it fair that "B" should be able to claim $1,250 from "A", when "A" could only recover $750 from "B"--in other words, that the guiltier of the two should recover more than the other?

There are two answers to this rhetorical question. First, the degree of a defendant's fault and the extent of the plaintiff's damage are typically quite unrelated; slight negligence can cause a great deal of damage; gross negligence may result in only a little damage. Nor does the law attempt to modify that random

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[8]This rule originated in Wisconsin: see Schwartz (supra n.3) at 78-80, 256-60.

relationship: a barely negligent defendant will have to pay for the whole of a large loss limited only by rules of "proximate cause." There is no reason for adopting a different principle in cases of contributory negligence. Comparative negligence merely requires a sharing (in accordance with the parties' fault) of each party's separate loss, but is indifferent to the size of their respective losses.

Secondly, the argument assumes that both parties will be paying for their liability out of their own pockets, whereas in all likelihood the losses will be borne by insurance carriers. Arguments appealing for fairness may carry some measure of plausibility in their application to individuals, but not to insurers whose function it is to spread the cost of accidents and levy premiums on a broad base.

4. A more pragmatic reason for the defense lobby's preference for the Wisconsin rule is that it reduces substantially the cost for defendants and their insurers. Not only does it disqualify all claims by a party more than 49% [or 50%] at fault, it also arms the defendant's insurance adjuster or attorney with a powerful negotiating weapon in beating down the demands of plaintiffs, under the risk that litigation may ultimately deny them any recovery whatever. The rule therefore has the tendency not only to disqualify many victims, but to depress the damages recovered by most others. Plaintiffs resisting such tactics would be driven to litigate. By the same token, "pure" comparative negligence would tend to promote settlements, since defendants and their insurers would be more inclined to compromise when the stakes are so considerably reduced.

Significantly, all judicial adoptions of comparative negligence opted for the "pure" version,[9] while most statutory adoptions chose the "Wisconsin" rule promoted by the defense bar.[10] The judicial choice, I would suggest, was less likely the result of plaintiff-bias than of the conviction that the Li principle of loss sharing proportionate to fault should be applied to all cases of multiple responsibility, rather than admitted only by way of exception to some cases while the remainder continued under the contributory negligence bar. Retention of the "pure" version is therefore here recommended.

5. Set-Off. A more technical problem with "pure" comparative negligence is how to adjust counterclaims. Under the "Wisconsin" 49% rule, counterclaims for losses arising out of the same accident are, of course, impossible, but under "pure" comparative negligence and the "50%" rule, such counterclaims are quite frequent, especially in cases of automobile collisions. Suppose that "A" and "B" each suffer $100,000 of damage and that their fault is apportioned in the ratio of 30:70. "A" may therefore claim $70,000 from "B", and "B" may counterclaim $30,000 from "A".

Under modern procedure, claim and counterclaim would ordinarily be set-off against each other,[11] with the result that

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[9]See the decisions cited supra n. 3.

[10]A list updated to 1977 is found in Foreword (supra n. 3) n. 1, 3 and 4.

[11]Cf. Adams v. Cerritos Trucking Co., 79 Cal. App. 3d 957, 145 Cal. Rptr. 316 (1978) (claim by tortfeasor "A" against joint tortfeasor "B" for "A's" damage conditioned on "A" discharging her share of joint liability to plaintiff).

"A" recovers $40,000 from "B" and "B" nil from "A". If both parties are uninsured, this result is entirely unexceptionable, indeed desirable especially if "B" were judgment-proof so as to prevent him from pocketing $30,000 from "A" while defaulting on his own larger debt to "A".

6. The equities are, however, radically different where both parties carry liability insurance. The purpose of liability insurance is not only to protect the insured against the adverse impact of liability, but to assure that the victim be actually compensated for his tort loss, instead of having merely an empty claim against a judgment-proof defendant.[12] But to allow set-off between "A's" and "B's" liability insurers would thwart the latter function and confer an undeserved windfall on the insurers. To revert to the preceding example, instead of a total of $100,000 ($70,000 to "A" + $30,000 to "B") flowing to the accident victims, only $40,000 will; by the same token, the insurance carriers will together save $60,000 at the expense of those they were meant, and paid, to benefit.

7. Two procedures are available to avoid this undesirable result. One is to prohibit set-off whenever one or all parties are insured against liability.[13] The other would attain the same result whenever both parties are fully insured or solvent, but deal more fairly with the not uncommon situation where one or the other party does not carry adequate coverage. This procedure was

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[12]See e.g. Barrera v. State Farm, 71 Cal. 2d 659, 79 Cal. Rptr. 106, 456 P.2d 674 (1969).

[13]E.g. (Rep. of Ireland) Civil Liability Act 1961 s. 38.

adopted by the Uniform Comparative Fault Act Section 3 (1977) and is here recommended.[14]

Its formula is as follows: there shall be set-off; but "if either or both of the claims are covered by liability insurance and an insurance carrier's liability under its policy is reduced by reason of . . . set-off, the insured is entitled to recover from the carrier the amount of the reduction. Amounts so recovered shall be credited against pertinent liability policy limits."[15] The underlying principle of this formula is that the insurance carrier would be enriched by the set-off and must disgorge that benefit to its own insured. If, in the preceding example, both parties were fully insured, "A's" carrier would pay nothing to "B" because of set-off. The set-off reduced its policy liability of $30,000 and it must pay that amount to "A". "B's" carrier must pay the net judgment of $40,000 to "A". Its own policy liability has been reduced by $30,000 and it must pay that amount to "B". In this instance, the end result is the same as if there had been no set-off. It is different, however, if we assume that "A's" and "B's" coverage is only $30,000. In that event, "A" receives $30,000 from his own insurer as in the previous example, but "B's" carrier pays $30,000 to "A" and pays nothing to "B"; "B" remaining liable to "A" for $10,000. Under a rule of "no set-off," "A" (who

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[14]Unlike State Bar draft Section 4 and SB 1959 (proposed CCP Section 878) which would specifically enact set-off in all situations. This proposal was, of course, opposed by CTLA in the Committee hearings.

[15]The Ingalls' bill (AB 3643 of 1978) contained alternative wording: " . . . except that any party whose liability for damages is covered by a policy of insurance shall be compensated by the insurer to the extent that the party's damages otherwise recoverable have been used to reduce the insurer's liability." Both formulas appear to derive from the Rep. of Ireland's Civil Liability Act 1961 s. 36 (5).

was entitled to greater damages) would have fared considerably worse, "B" better,[16] thus "penalizing the party who can pay his obligation, if the other party is unable to pay."[17] Instead, the suggested formula creates an incentive to carry adequate coverage, which would be desirable from everybody's point of view (including insurers').

8. RECOMMENDATION 1: (1) Statutory confirmation of "pure" comparative negligence and (2) adoption of the modified set-off formula in Section 3 of the Uniform Comparative Fault Act.

9. Fault. Your Committee specifically solicited my comments on the question of what kinds of fault were susceptible to comparison under a comparative fault regime.[18] At one end of the spectrum, one party may have been grossly negligent or even reckless; at the other end of the spectrum, his liability may be strict (no fault): how can one compare either one with ordinary negligence? Even where both parties are negligent, their negligence may be related to entirely different spheres, like the negligent producer of a defective automobile and an inattentive driver. Justice Clark has been foremost in focussing criticism on the perplexity of comparing "apples and oranges."[19]

The problem has been considered in several contexts by California courts.

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[16]"A" would have recovered only $30,000 from "B's" insurer, nothing from his own, and thus would have been $40,000 short (4/7 of his loss; $30,000 from "A's" insurance).

[17]Comment to Section 3 of the Uniform Comparative Fault Act.

[18]Letter of July 7, 1978 (Denise Jarman, Legal Intern).

[19]American Motorcycle Assn. v. Superior Court, 20 Cal. 3d 578, 609 (1978); Daly v. General Motors Corp., 144 Cal. Rptr. 380, 393-395 (1978).

10. Strict Liability. Most important was the decision in Daly v. General Motors Corp.,[20] that a plaintiff's contributory negligence would, since Li, reduce his damages against the manufacturer of a car, strictly liable for a defectively designed latch. Prior to Li, contributory negligence other than continued use of the product after becoming aware of the defect (assumption of risk) or actual misuse, was not a defense to a claim based on strict liability, although it involved the Quixotic result that a negligent manufacturer was treated less harshly than one sued on a no-fault theory of strict liability. The problem in Daly was therefore whether to retain that rule or henceforth to admit a limited defense of comparative negligence. The latter alternative would itself entail the somewhat paradoxical result of worsening the position of plaintiffs pursuant to a decision (Li) whose objective and effect had been to improve it. On the other hand, the widespread exclusion of the defense of contributory negligence from claims for strict liability was largely motivated by the harshness of the all-or-nothing rule as well as by a desire not to impede the loss-distributive function of products liability. Since Professor Schwartz is submitting a detailed analysis of the specific problem of products liability to your Committee, the following comments are addressed primarily to the "apples and oranges" argument and to general policy considerations.

Justice Richardson, speaking for the majority in Daly, admitted "the theoretical and semantic distinctions between the

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[20]20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 1162 (1978).

twin principles of strict products liability and traditional negligence,"[21] but questioned the "insistence on fixed and precise definitional treatment of legal concepts."[22] For one thing, there had been "much conceptualistic overlapping and interweaving"[23] in this area; for another, contributory "negligence" was itself a misnomer, since it did not connote breach of a duty to another and was therefore different anyway from "actionable negligence" by a defendant. Comparative "fault" would therefore have been a better term; or, better still, "equitable apportionment or allocation of loss."[24] Hence, instead of "matching linguistic labels," it was more useful to "examine the functional reasons underlying the creation of strict products liability in California to ascertain whether the purposes of the doctrine would be defeated or diluted by adoption of comparative principles."[25] Justice Richardson's opinion concluded that these goals would not be frustrated, inasmuch as the plaintiff would continue to be relieved of proving the defendant's negligence, "defenseless" plaintiffs would still be protected except for a reduction of damages proportionate to their own fault, and the cost would still be spread among society.

After dismissing the contention that the admission of comparative negligence would lessen the manufacturers' incentive to

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[21]20 Cal. 3d 725, 734.

[22]Ibid.

[23]Ibid., at 735.

[24]Ibid., at 736. It is notable that the American usage of "comparative negligence" stands alone; in England and the Commonwealth it is called "apportionment."

[25]Ibid.

produce safe products, the Court addressed the claim that "as a practical matter, triers of fact, particularly jurors, cannot assess, measure, or compare plaintiff's negligence with defendant's strict liability."[26] Pointing to the federal experience under the maritime doctrine of unseaworthiness, Richardson J. concluded that jurors were quite capable of undertaking a fair apportionment of liability. This view is evidently shared by a preponderant number of courts in other states,[27] by many scholars,[28] and by the draftsmen of the Uniform Comparative Fault Act which defines fault as including "acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict liability."[29]

11. The contrary viewpoint was forcibly put in Daly by the dissenting opinions of Jefferson J. and Mosk J.[30] The former stressed the difficulty faced by jurors in comparing negligence with strict liability and the resulting unpredictability and inconsistency of verdicts; the latter predicted substantial prejudice to plaintiffs because the majority decision handed a powerful and "boilerplate" negotiating ploy to defendants and thus undermined the protective function of strict products liability.

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[26]Ibid., at 738.

[27]Ibid., at 739-740. Including most foreign countries with substantial experience of this problem: see 11 International Encyclopedia of Comparative Law ch. 7 Section 173 (Honore).

[28]Ibid., at 741.

[29]Section 1(b). See also the California State Bar draft Section 1 (SB Section 775) which applies comparative fault to "all tort . . . actions," the accompanying comment specifically argues for inclusion of strict liability.

[30]Ibid., at 750-57 and 757-64.

12. Clearly, the issue is one of policy, not semantics. If one views strict liability as an exceptional deviant from a central principle of liability based on fault, the plaintiff's fault not only seems relevant but may invite the conclusion that it should actually exclude all liability of the tortfeasor. Thus it is the preponderant view that a tortfeasor liable without fault is entitled to a full indemnity from a negligent tortfeasor,[31] but it is, of course, notable that the issue in that context does not affect the victim and therefore does not impinge as directly on any protective purpose of the strict liability rule. Hence where the issue is not between joint tortfeasors inter se, but between defendant and victim, the real choice is between the "risk" and the "insurance" theory of liability.[32]

Under the risk theory, the plaintiff's negligence would be taken into account when the basis of the tortfeasor's strict liability is the risk created by his activity. That risk is, of course, all too obvious in the case of defective products, so obvious indeed that the liability is frequently distinguished from "absolute" liability and some courts have even likened it to "fault" liability, sufficient on any account for comparing fault.[33] This theory has its strongest proponent in Germany. Some of the German statutes creating strict liability specifically provided for the defense of comparative negligence, but the principle has long

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[31]See Kissel, Contribution and Indemnity Among Strictly Liable Defendants, 16 For the Defense 133 (1975); Foreword, 270 n. 118.

[32]See 11 International Encyclopedia of Comparative Law, ch. 7 Section 173 (Honore).

[33]Powers v. Hunt-Wesson Foods, 64 Wis. 2d 532, 219 N.W. 2d 393 (1974). The Wis. statute authorizes comparative negligence only with respect to "claims based on negligence."

since become one of general "common law" application.[34] Weighed on the side of strict liability is the "enterprise risk" (Betriebsgefahr), e.g. the risk posed by driving an automobile, truck or train, flying an airplane, or transmitting gas or electricity. This is counted against plaintiffs no less than defendants,[35] so that in an automobile collision, even an "innocent" driver ordinarily suffers a reduction in his claim against another negligent driver. Even the "conceptual" problem has been eased because, according to the official theory, what is being compared is not fault, but causative effect. Thus the reduction or extinction of liability depends on the injured party's contribution to the harm, and even gross negligence does not wholly exclude liability.

The competing "insurance" theory stresses the protective purpose of the strict liability rule which arguably should not be impaired by the threat of reduction for the injured party's fault. This view appears to have the largest following in the U.S. where traditionally the plaintiff's contributory negligence has been regarded as irrelevant to claims based on strict liability.[36] But as already pointed out, the chief motivation in the past appears to have been to escape the drastic effect of the all-or-nothing rule rather than any philosophical commitment. Moreover, the case law was sparse and unimpressive until strict liability received its mighty boost in its application to defective products. The problem is, therefore, essentially novel in the United States.

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[34]Supra n. 32.

[35]Esser, 2 Schuldrecht (3d ed. 1969) 496.

[36]See Restatement, Second, of Torts Section 402A, Comment n.

13. Unfortunately, the debate in Daly did not yield an adequate justification of the opposing views. Only Mosk J. put the "insurance" theorem clearly into the forefront of his dissent; Jefferson J. alluded to it,[37] but only to explain briefly why he preferred to allow the plaintiff to recover in full rather than bar him completely, his main point being to continue the all-or-nothing rule for want of any practical method of comparison. On the other hand, the majority was bent only on defending the practicality of comparison and the negative proposition that it would not impair the efficacy of strict products liability. It assumed as an incontrovertible premise that the Li rationale was otherwise applicable to strict liability. It thus failed to propose a sound theoretical foundation for making the required comparison and floundered amidst such terms as "comparative fault" and "equitable apportionment" as better alternatives to "comparative negligence."

The risk theory would have furnished such a needed foundation, as would perhaps a nod toward causation as an auxiliary criterion for comparison. Notably, the English legislation avoided this impasse by employing the more open terminology that the damages "shall be reduced to an extent as the court thinks just and equitable, having regard to the claimant's share in the responsibility of the damage."[38] Moreover, the same legislation defines fault as consisting in "negligence, breach of duty or

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[37]20 Cal. 3d 725, 756-57.

[38]Law Reform (Contributory Negligence) Act 1945 s. 1.

other act or omission which gives rise to liability in tort."[39] This has enabled courts to have regard not only to the parties' fault in the conventional sense, but also to the causative potency of their conduct, the fact that the impact of reduction on the plaintiff is quite different from that on a defendant (who is insured) and other considerations relevant to fair loss distribution. As already pointed out, the Uniform Comparative Fault Act specifically includes strict liability in its definition of fault.[40]

14. Oddly enough, neither side in the Daly debate took issue over whether reduction on account of contributory fault would advance the cause of accident prevention. The argument that it would has been a staple of the new school of lawyer-economists who seek liability rules that would promote the most "efficient" accident preventive responses by potential plaintiffs and defendants.[41] Their argument typically assumes rational responses by the affected parties to given choices, such as that users of a product will exercise greater care in self-protection under the threat of reduced damages. Professor G. Schwartz recently explored, but convincingly demolished, this utilitarian argument as an unrealistic foundation for the defense of contributory negligence in any of its forms.[42] This does not, of course,

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[39]Ibid., s. 4.

[40]Supra n. 29.

[41]E.g. Posner, Economic Analysis of Law, 123-24 (2d ed., 1977); Demetz, When Does the Rule of Liability Matter, 1 J. Leg. Stud. 13, at 27 (1972).

[42]G. Schwartz, Contributory Negligence and Comparative Negligence: A Reappraisal, 87 Yale L. J. 697 (1978).

preclude other justifications, such as a sense of fairness that one who claims compensation from another for having created an unreasonable or excessive risk should not expect the law to ignore completely his own contribution in foolishly bringing about his own injury.

15. Strict liability may raise a problem in the context not only of contributory negligence, but also of contribution. A strictly liable defendant may seek contribution from a negligent joint tortfeasor, and vice versa. Pre-Li law was largely distorted by distinctions between "primary and secondary" or "active and passive" negligence, and by the all-or-nothing dilemma where contribution was not available. It was this very confusion which prompted the New York and California courts in Dole and American Motorcycle to make a new start under the banner of "partial indemnity" (infra). The California Supreme Court in American Motorcycle specifically stressed the need for a new start after commenting at length on the unsatisfactory prior decisions dealing with products liability defendants.[43] These decisions can therefore no longer provide any guidance for the future.

In accordance with the preceding discussion, therefore, there is no longer any good reason why a strictly-liable defendant should necessarily either have to bear the whole or none of the loss concurrently caused by his defective product and the negli-

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[43]American Motorcycle Assn. v. Superior Court, 20 Cal. 3d 578, at 591-99, especially its analysis of Ford Motor Co. v. Poeschl, Inc., 21 Cal. App. 3d 694, 98 Cal. Rptr. 702 (1971). See also Note, Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants, 50 So. Cal. L. Rev. 73 (1976).

gent conduct of another tortfeasor. In particular, not even the "insurance" theory of strict liability would militate against contribution since it is not within the protective purpose of the strict liability rule to protect anyone other than the victim, least of all anyone whose negligence contributed to the injury. This view was recently adopted by the Supreme Court of Illinois in Skinner v. Reed-Prentice Div. Package Mach. Co.,[44] allowing contribution to the manufacturer of defective machinery against a negligent employer.[45] As that court saw it, "the public policy considerations which motivated the adoption of strict liability . . . were that the economic loss suffered by the user should be imposed on the one who created the risk and reaped the profit . . . When the economic loss of the user has been imposed on a defendant in a strict liability action, the policy considerations . . . are satisfied and the ordinary equitable principles governing the concepts of indemnity or contribution are to be applied . . ."[46]

On the facts of Skinner, contribution rather than indemnity appeared the proper solution. Significantly, the Court regarded causation as the criterion for apportioning the loss.[47]

16. Willful Misconduct. So far there has been little judicial clarification of the converse situation, namely, the

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[44]374 N.E.2d 437.

[45]How to reconcile contribution or indemnity with the employer's immunity under the workmen's compensation statute raises another issue discussed in Section VIII of this Study.

[46]Ibid., at 443.

[47]" . . . be apportioned on the basis of the relative degree to which defective product and the employer's conduct proximately caused [the injuries]" (at 442).

effect of grosser forms of fault by the plaintiff. One problem area concerns the supply of liquor to a person who is obviously intoxicated, in violation of Bus. & Prof. Code Sec. 25602 (since repealed[48]). In Kindt v. Kauffman,[49] the Court of Appeal (3d Dist.) upheld a demurrer to a claim for personal injuries sustained in an automobile accident by a bar patron who was obviously intoxicated when supplied with liquor by the defendant bartender. The Court held that no duty was owed to such a patron and that an adult bar customer who voluntarily becomes intoxicated is guilty, as a matter of law, not of mere negligence but of willful misconduct. Even after Li, such conduct remained an absolute bar to recovery, whether the defendant was himself guilty merely of negligence, or also of willful misconduct; in short, there was no rule of comparative willful misconduct. However, in Ewing v. Cloverleaf Bowl[50] the Supreme Court disapproved of two propositions in Kindt: it held (1) that bartenders did owe a duty to their patrons no less than to third-parties endangered by their patrons,[51] and (2) that a patron does not necessarily, as a matter of law, commit willful misconduct in consuming liquor even when bent on deliberately becoming drunk.[52] In consequence, if the jury concluded that the patron's conduct was merely negligent but the bartender's amounted to willful misconduct, such willful

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[48]Laws of California, 1978 ch. 929, 930.

[49]57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976).

[50]20 Cal. 3d 389, 143 Cal. Rptr. 13, 572 P. 2d 389 (1978).

[51]Ibid., at 401.

[52]Ibid., at 404.

misconduct would remove the bar of contributory negligence in accordance with pre-Li law. The Court did not venture any comment on the likely outcome of such a case under the Li rule.

The Uniform Comparative Fault Act applies the "comparative fault" regime to all "acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others."[53] It is doubtful whether "reckless" was not intended to include also "willful misconduct;" at any rate, there is no policy reason why it should not -- only intended injury or self-injury should be excluded. But for the sake of clarity, it would be advisable to include in any adoption of the Uniform Act in California a specific reference to "willful misconduct," a term less familiar in other states.

17. The application of "comparative negligence" to forms of aggravated fault may occur in three different situations. First, the defendant may be reckless, but the plaintiff merely negligent. The pre-Li rule which allowed the plaintiff to recover in full was dominated by the all-or-nothing dilemma. Since this compunction has now disappeared, it is possible to combine reduced recovery for the plaintiff with liability for the defendant. To say that recklessness or willful misconduct is fault of a different kind rather than degree was merely a rhetorical device which is no longer necessary to do justice in this situation.

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[53]Section 1(b). The same conclusion could be inferred, but less clearly from the California State Bar draft's open-ended definition of fault as "any act or omission . . . which constitutes breach of any duty . . ." (The comment to Section 2 does not advert to the problem).

The second situation is the converse: the plaintiff being reckless but the defendant merely negligent. Under pre-Li law, the plaintiff could not recover if merely negligent, a fortiori if reckless. Under the comparative negligence formula, it will now be possible to allow him to recover albeit substantially reduced damages. Aggravated fault is still fault that can and should be brought into comparison with lesser fault, regardless of its label. Significantly, a recent Swedish reform allows reduction of damages no longer for ordinary negligence at all but only for gross negligence and the like.[54] This distinction is based on the view that the impact of reduced recovery for a plaintiff who is typically not covered by insurance is too punitive to be justified except in case of grosser forms of misconduct. In the U.S. where social security benefits are far less available to accident victims than in Sweden, this reasoning has, if anything, added force.

The third situation is one where both parties are guilty of recklessness or willful misconduct, as is likely to be the case of the bartender and intoxicated patron. Here two solutions are possible: either to compare the two equal types of fault, or to deny all recovery. The latter alternative, as already related, appealed to the Court of Appeal in Kindt v. Kauffman.[55] It likened the situation to persons who engaged in a joint illegal enterprise, such as speeding and prize fights, where the traditional rule has been to dismiss all claims on the maxim ex turpi

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[54]Tort Liability Act ch. 6, Section 1 (1975).

[55]Supra n. 49.

causa non oritur actio. To allow recovery, even reduced recovery, would not only offend morality, but tend to encourage patrons to excessive consumption of liquor. Nor would liability provide a deterrent to tavern owners who would simply pay higher insurance premiums and pass the cost on to the public. The dissenting judge, Friedman J., on the other hand, believed that, while Section 25602 was ineffective as a criminal or licensing provision, a civil sanction would stimulate the tavern owner's responsibility in conjunction with the comparative negligence rule. Clearly, the issue is one of policy which might well be left to the courts to work out on an ad hoc basis. A specific provision to deal with joint illegal enterprises involving "willful misconduct" is not therefore recommended.

18. I do not propose to discuss the relation between contributory negligence and voluntary assumption of risk. This topic has been extensively debated by courts and commentators.[56] I am in full agreement with the proposal of the Uniform Comparative Fault Act to include in the definition of fault (Section 1[b]) "unreasonable assumption of risk not constituting an enforceable express consent."

19. RECOMMENDATION 2: (1) Apply "comparative negligence" to claims based on strict liability; and (2) include "recklessness" and "willful misconduct," short of intentional injury, among the kind of fault capable of reducing, but no longer necessarily barring recovery.

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[56]E.g. Schwartz (supra n. 2) ch. 9; Woods (supra n. 2), ch. 6; Foreword, (supra n. 3) 260-67.

II. AMERICAN MOTORCYCLE

20. The Li court deliberately refrained from addressing itself to the several problems raised by the introduction of comparative negligence in multi-party situations. It noted that such problems "lurk in the background" but directed the lower courts to apply the Li rationale to unsettled questions in a practical manner.[57] A weighty argument in favor of legislative, rather than judicial, introduction of comparative negligence has been precisely the need to deal with the whole complex of incidental issues in one blow, instead of countenancing a protracted period of legal uncertainty. This pessimistic prognosis revealed itself as only too true: hundreds of cases came to clog trial courts in the next two years in anticipation of an authoritative resolution of issues that were hopelessly dividing intermediate courts of appeal.[58] Nothing whatever was gained by this postponement, since the issues were from the start unlikely to be clarified by protracted reflection or practical experience. It was none too soon when the Supreme Court in American Motorcycle Assn. v. Superior Court[59] at last had an opportunity of addressing these tardy issues.

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[57] 13 Cal. 3d at 823-27, 532 P.2d at 1240-42, 119 Cal. Rptr. at 872-74.

[58] Stambaugh v. Superior Court, 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976); Safeway Stores v. Nest-Kart, 63 Cal. App. 3d 934, 134 Cal. Rptr. 150 (1 Dist. 1976); American Motorcycle Assn. v. Superior Court, 134 Cal. Rptr. 497 (2 Dist. 1977).

[59] 20 Cal. 3d 578, 143 Cal. Rptr. 692 (1978).

21. In American Motorcycle the plaintiff, a teenage boy, sought to recover damages for serious injuries he incurred as participant in a cross-country motorcycle race for novices. He sued the sponsoring organizations who (besides denying negligence and alleging contributory negligence) sought leave to file a cross-complaint against the plaintiff's parents for negligent failure of supervision. The trial court denied the motion on the ground that the California Contribution Act (CCP Section 875) allowed contribution only among tortfeasors held liable in a joint judgment and, since the plaintiff himself had not (for obvious reasons) made his parents co-defendants, the defendant had no cause of action against them for contribution.[60] The Court of Appeal reversed, holding that the rationale of Li required the abrogation of joint and several liability for concurrent tortfeasors:[61] first, because any individual defendant's liability should no longer exceed his own share of fault any more than a plaintiff's; secondly, because a plaintiff guilty of contributory negligence did not have the same equity as a totally innocent victim in claiming to recover his full damages from any one of several co-tortfeasors. For this reason, the court's solution was expressly limited to situations where a plaintiff was himself at fault.

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[60]See Thornton v. Luce, 209 Cal. App. 2d 542, 26 Cal. Rptr. 393 (1962).

[61]135 Cal. Rptr. 497 (1977, 2d Dist. Div. 1; opinion by Thompson J.). The Court granted mandate to allow the joinder on the ground that it was desirable to fix the share of the cross-defendant.

Eventually the Supreme Court, though affirming the writ of mandate, differed radically from either of the courts below regarding the resolution of the problems raised.[62] In an opinion by Tobriner J., the Court held that (1) the Li rationale did not warrant abolition of the joint and several liability of concurrent tortfeasors, regardless of whether the plaintiff was himself at fault;[63] (2) a defendant could claim "partial indemnity" from a concurrent tortfeasor for his apportioned share of fault,[64] notwithstanding the direction of CCP Section 875-876 that contribution be allocated "pro rata" (i.e. according to the number of defendants) and not in accordance with their individual shares of fault;[65] (3) such "partial indemnity" can be claimed from a co-tortfeasor even though he has not been made a party-defendant by the plaintiff, notwithstanding the requirement of CCP Section 875 that contribution is limited to tortfeasors who have been held liable in a joint judgment;[66] (4) a good faith settlement with one tortfeasor released him from all liability to share with co-tortfeasors, but reduced the plaintiff's claim against such co-tortfeasors only by the amount of the settlement, not by the settlor's share of fault: in both respects adopting for "partial indemnity" the policy laid down for contribution by CCP Section 877,[67] (5) the plaintiff's share of fault must be determined by

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[62]Supra n. 59.

[63]20 Cal. 3d at 586-91.

[64]Id., at 591-99.

[65]Id. at 599-605.

[66]Id. at 605-07.

[67]Id. at 603-04.

weighing his negligence against the combined total of all causative negligence, not only that of co-defendants, but including even absent tortfeasors.[68]

The following discussion will analyze each of these points in turn.

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[68]Id. at 590 fn. 2.

III. JOINT AND SEVERAL LIABILITY

22. The Court reaffirmed the traditional "joint and several" judgment rule[69] in its application, after Li, as much to plaintiffs who are guilty of contributory fault as to those who are completely innocent. It thereby differed from the court below which would have allowed contributorily negligent plaintiffs to recover from any one defendant only his apportioned share of liability.[70] The Court advanced three arguments: First, it rejected the contention that since Li there was now a basis for dividing damages, namely on a comparative negligence basis, in contrast to the prior all-or-nothing philosophy. The joint and several liability rule, the Court said, was long ago extended from "joint tortfeasors," in the strictest sense of tortfeasors acting in concert, to all concurrent tortfeasors who, though acting independently, cause an indivisible injury. (The term "joint tortfeasors" is hereafter used in this Study in the more comprehensive second sense). Since the negligence of each was a proximate cause of an entire and indivisible injury, there was no equitable claim vis-a-vis an injured plaintiff to be relieved

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[69]This terminology has become customary in the U.S., by and large superseding "liability in solidum" or "solidary liability."

[70]That decision (supra n. 58) had been influenced by the desire to conform to the Li rationale without violating CCP §875. Since the Supreme Court found another way around CCP §875, it was under no similar constraint regarding the issue of "joint and several" liability.

from liability for the whole of that injury. "In other words, the mere fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury."[71]

But as Clark J. pointed out in his dissent,[72] this argument by the majority proves too much: plaintiff's negligence is also a proximate cause of the entire indivisible injury, but this did not prevent the Li court from repudiating the all-or-nothing solution.

23. The Court's second argument consists of two parts: first,[73] it points to the incontestable fact that even after Li some plaintiffs will continue to be wholly free of contributory negligence. But while these no doubt continue to deserve the benefits of the "joint and several" liability rule, this does not prove that those guilty of contributory negligence should be treated the same. All one can say is that, if there is to be the same rule for all plaintiffs, the hardship of depriving innocent plaintiffs of the "joint and several" liability rule arguably outweighs the hardship for defendants in being so answerable even to negligent plaintiffs.

24. The second part of this argument in favor of "joint

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[71]Id. at 589.

[72]Id. at 611.

[73]Id. at 589.

and several" liability[74] is that a plaintiff's culpability is not equivalent to a defendant's because the first consists merely in lack of self-care ("self-directed negligence") whereas the second connotes danger to others.[75] This distinction ought, of course, to be heeded in apportioning shares of fault,[76] but does not seem to justify treating the shares, once ascertained, differently under the focus of the Li principle (viz. that liability should not exceed an individual's share of fault). Indeed, the argument comes close to challenging the Li principle itself insofar as it suggests that plaintiff's and defendant's culpability are of a different order.[77] The Court itself recognized the double-edged nature of its own argument by weakly suggesting that, although it did not preclude comparative negligence, "the fact remains that insofar as the plaintiff's conduct creates only a risk of self-injury, such conduct, unlike that of a negligent defendant, is not tortious."[78] At this point the argument collapses.

25. However, the Court's third rationale touched a firmer base. The cutting edge of the "joint and several" liability rule is that it imposes the risk of a co-tortfeasor's inability to pay his share on the remaining defendants, whereas limiting a

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[74]Its link with the first part is obscure; it looks more like an independent rationale.

[75]Id. at 589.

[76]See Fleming, Law of Torts (5th ed. 1977) 257.

[77]Cf. Clark J. at 612 ("But the differences warrant departure from the Li principle in toto or not at all").

[78]Id. at 590.

co-tortfeasor's liability to his own share alone would place that risk on the plaintiff. As already pointed out, the former solution is universally regarded as the fairer where the plaintiff is entirely innocent. On the other hand, it is not self-evidently also the fairer (as the Court thought it was) where the plaintiff was himself at fault. One's doubt increases the greater the proportion of the plaintiff's fault compared with the defendant's: suppose that P[laintiff]'s fault was 60%, D[efendant]$_1$'s 10% and D_2's 30%. Why should D_1, who is far less at fault than P(1:6), "guarantee" also of D_2's share, when P's negligence, no less than D_1's, was a proximate cause of his injury and his fault greater to boot?[79] Surely the only fair solution compatible with the Li rationale of limiting each participant's liability to his own share of causative fault is to impose the risk of D_2's insolvency neither wholly on P nor wholly on D_1, but to distribute it among P and D_1 in proportion to their respective shares of fault. The best way to accomplish this result is to retain the "joint and several" liability rule, subject however (as will be pointed out below) to a later redistribution of D_2's unsatisfied share.

An additional practical reason is that a rule of "several" liability would inject substantial complications into tort litigation and settlement, and thereby place a new burden on the disposition of tort claims. It would necessitate a verdict on

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[79]Clark J. (at 613) thought it more plausible for a jurisdiction like Wisconsin to adhere to "joint and several" liability because a plaintiff whose share was greater than the defendant's would still be debarred from recovering against any of them. But the problem differs only in degree, not kind, according to the plaintiff's share being more or less than the defendant.

the responsibility of all conceivable parties to the litigation even where there is no question of the plaintiff's contributory negligence and might even tempt the plaintiff into the embarrassing position of arguing that an insolvent defendant was not negligent in order to avoid reduction of his verdict against the remaining defendants.

26. In sum, the majority opinion in American Motorcycle did not make the strongest case on behalf of a sound result. It got lost in the maze of conceptualism instead of facing up to the practical aspects of jettisoning the "joint and several" liability rule. That rule is justified, not by a one-sided preference for plaintiffs, but by the very principle of evenhandedness between plaintiffs and defendants in Li. It should therefore appeal to the plaintiffs' and defendants' bar alike on grounds of fairness: the "several" liability rule of the Court of Appeal in American Motorcycle is unfairly skewed against plaintiffs, whereas the Supreme Court's opinion carries the seeds of unfairness for defendants.

In a small number of jurisdictions the "joint and several" liability rule has been abandoned in its application to contributorily negligent plaintiffs.[80] But the overwhelming majority have extended the rule to such plaintiffs, either by express legislation or by judicial decision.[81] Such an extension is also contained in the Uniform Comparative Fault Act and the California

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[80]E.g. under the Kansas, Nevada, New Hampshire and Vermont statutes.

[81]See the state-by-state tabulation, with citation to the relevant statutes or decisions, in the Appendix to American Motorcycle Assn. v. Superior Court, 135 Cal. Rptr. 497, 506-12.

State Bar draft (SB 1959), and was recommended in Professor G. Schwartz's Report to your Committee[82] in opposition to the proposal of the California Citizens' Commission Report.[83] Since such an extension was not precluded by legislation in California, no objection could be raised to the Court's decision to so extend it in working out the implications of its own Li precedent.[84] It may, nonetheless, be preferable to give statutory sanction to the rule in the context of the more general statutory revision recommended by this Study.

RECOMMENDATION 3: Retention of the "joint and several" liability rule even where the plaintiff contributed to his injury through his own fault.

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[82]Recommendation 4D.

[83]Report 114-23.

[84]Clark J.'s insistence that this was a legislative task (id. at 612-13) must be viewed in the light of his same objection against the Li decision.

IV. COMPARATIVE CONTRIBUTION

27. The second major ruling of the Court in American Motorcycle was to sanction comparative contribution among tortfeasors under the new label of "partial indemnity."[85] Contribution among tortfeasors has in the main been a creature of statute in derogation of the common law which, as in the parallel situation of contributory negligence, countenanced only an all-or-nothing solution. In a few, but ill-defined, situations, the Common Law permitted a shifting of the whole liability from one tortfeasor to another (principally from one liable merely for faultless causation, e.g. in cases of vicarious liability); otherwise it denied all relief on the puritannical ground that it would not assist a wrongdoer (in pari delicto potior est conditio defendentis). In no event, could there be sharing.

In a majority of U.S. jurisdictions, contribution was introduced by adoption, or at least under the inspiration, of the Uniform Contribution Among Tortfeasors Act. This model, in both its versions (1939 and 1955), opted for "pro rata" contribution, i.e. by equal shares among the tortfeasors, rather than for "comparative" contribution, i.e. in proportion to their shares of fault. This choice has been defended on the following grounds: first, that (contribution being an equitable doctrine) "equity is equality." Secondly, since the negligence of each tortfeasor

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[85]Supra n. 59, at 599. Applied to strict liability in Safeway Stores v. Nest-Kart, 21 Cal. 3d 322, 146 Cal. Rptr. 550 (1978).

must have been a proximate cause of the injury, its causative effect could not be assessed otherwise than by giving it equal weight with that of the others. More persuasive than these a priori arguments are two practical considerations: first is the simplicity of pro rata division. It dispenses with the need for, and costs of, any protracted inquiry into shares of fault and aids settlements because the formula is categorically fixed by law. Secondly, its advocates contend that the formula promotes settlements in yet another way: insofar as a defendant with a low percentage of fault will settle rather than risk being found liable at a trial and incurring pro rata liability. This argument, however, seeks to make a virtue out of its potential for serious abuse, namely, as a means not for encouraging, but for extorting settlements from slightly negligent defendants. As the Wisconsin court observed, after labelling it "a convenient blackjack," "the end does not justify [such] means."[86]

28. Pro rata contribution is, however, incompatible with the Li rationale of apportioning liability in accordance with shares of fault. That rationale clearly has as much relevance between several defendants as it has between plaintiff and defendant(s). Obviously, its appeal increases the larger the disparity of fault: no wonder that it was in a case of 5:95 that the Wisconsin court felt impelled to abandon the pro rata rule.[87] Moreover, in cases where a contributorily negligent plaintiff is facing several negligent defendants, the pro rata rule would,

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[86]Bielski v. Schulze, 16 Wis. 2d 1, 12; 114 N.W.2d 105, 111 (1962).

[87]Bielski v. Schulze, supra n. 86.

since Li, lead to strikingly odd results: suppose, e.g., that P is adjudged 25% at fault, D_1 25% and D_2 50%. If P chose to collect 75% of his loss of $100,000 from D_1, as he is entitled to do under the "joint and several" liability rule, it would run counter to the Li rationale to limit D_1's claim for contribution to $37,500 (50% of $75,000) instead of $50,000 ($D_2$'s fault-proportioned share). Such a rule would make the ultimate allocation of liability contingent on a random factor, namely, the amount which the plaintiff chose to collect from D_1. Hence, whatever the justification for the "pro rata" rule at the time when contributory negligence was a complete defense, it became incongruous with the introduction of comparative negligence. An increasing number of jurisdictions have, therefore, adopted "comparative contribution" either by legislation[88] or judicial decision.[89]

29. The only obstacle to the California Court following this trend was California's Contribution Statute of 1957 (CCP §875) which followed the 1955 Uniform Act in prescribing the "pro rata" rule.[90] The same obstacle had been faced down by the

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[88]E.g. Minn. Stat. Ann. §604.01 subd. 3(b); Nev. Laws (1973) ch. 787 §1, subd. 3(b); N.H. Rev. Stat. Ann. §507, 7-a; N.J. Stat. Ann. §2A, 15-15.1 to §2A, 15-15.3; N.Y. Civil Practice Act (C.P.L.R.) §1401 (McKinney Supp. 1974); N.D. Cent. Code §9-10-07; Ore. Rev. Stat. §18.485; Tex. Vernon's Civ. Stat. Art. 2212a §2(b); Utah Code Annot. §78-27-40 (2); Vt. Stat. Ann. 1959, Tit. 12 §1036.

[89]Bielski v. Schulze, (supra n. 86), Packard v. Whitten, 274 A.2d 169 (Me. 1971).

[90]The statute was sponsored by the State Bar of California which provided an explanation of its purposes to the Senate Judiciary Committee (1 Sen. J. Appendix) (Reg. Sess. 1957, p. 130).

New York Court of Appeals five years earlier in Dole v. Dow Chemical Co.[91] Following this precedent, the Supreme Court argued that its version of sharing among tortfeasors in accordance with fault was a development of "equitable partial indemnity" which had not been foreclosed by the statutory scheme of "contribution" enacted by CCP Sections 875-877. This argument was entirely result-oriented and might well be criticized as a usurpation of the legislative function.[92] As previously explained, indemnity has always meant a shifting of the complete liability, while contribution signifies a sharing of liability. Thus for the Court to invent the label of "partial indemnity" for a new judicial regime of loss sharing was merely a semantic maneuver to sidestep the parameters of the legislative regime of "contribution."[93] In effect, the Court read CCP Section 875-877 out of the statute book by freeing "partial indemnity" from two unwelcome limitations: (1) the requirement of a joint judgment (see infra) and (2) the "pro rata" allocation of shares.

The New York legislature, prodded by its own Court's decision in Dole v. Dow Chemical Co., two years later amended its Contribution Act by enacting contribution in proportion to fault.[94] Faced with exactly the same situation, the California

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[91]30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

[92]See my criticism of Dole v. Dow Chemical in Foreword (supra n. 3) at 255-56.

[93]The Court also attempted to reinforce its position by finding statutory encouragement in the statute itself for a continued development of "equitable indemnity" (at 599-605). It would serve no purpose in this Study to counter this disingenuous argument point for point.

[94]C.P.L.R. §1401 (McKinney Supp. 1974).

legislature should do likewise. Such also is the proposal of the Uniform Comparative Fault Act and the California State Bar draft (SB 1959).

30. RECOMMENDATION 4: Statutory enactment of contribution by shares proportioned to fault in lieu of the existing system of contribution "pro rata" (equal shares).

V. THE "JOINT JUDGMENT" RULE

31. In enacting its contribution statute in 1975 (CCP Section 875), California deviated from its model, the Uniform Contribution Among Tortfeasors Act (1955), by limiting contribution to tortfeasors against whom "a money judgment has been rendered jointly." It has since been held that no cross-complaint for contribution can be filed against a tortfeasor not sued by the plaintiff so as to make him a party defendant in the plaintiff's action and thus set the stage for an eventual joint judgment.[95] "The result is a circular series of contingencies that cannot be satisfied. The defendant has no right to contribution unless he obtains a joint judgment, he cannot obtain a joint judgment unless he states a cause of action, and he cannot state a cause of action unless he has a right of contribution.[96]

32. Several arguments account for this position. One is that it avoids such complications as inconsistent verdicts, disputes over the amount of the plaintiff's loss, what effect to attach to a prior settlement, lapse of time, and so forth. Another is that it promotes administrative efficiency by deterring multiple litigation. But both objectives can be attained without pro-

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[95]General Electric v. State of California, 32 Cal. App. 3d 918, 925-26 (1973); Thornton v. Luce, 209 Cal. App. 2d 542, 26 Cal. Rptr. 393 (1962). See Goldenberg & Nicholas, Comparative Liability Among Joint Tortfeasors: The Aftermath of Li v. Yellow Cab Co., 8 U.W.L.A. L. Rev. 22 at 43-54 (1976).

[96]Goldenberg & Nicholas, supra n. 95, at 45.

hibiting cross-complaints. Thus Michigan, prior to abandoning the joint judgment requirement altogether in 1974, specifically permitted cross-complaints for contribution to satisfy the joint judgment requirement.[97]

Less tractable are two policy arguments. Foremost is the plea that the plaintiff should be free to select his adversaries without possible prejudice from having defendants foisted on him at the trial who might evoke special sympathy, leading to lower verdicts. This is an argument against cross-complaints but not, of course, against separate actions for contribution.

The preceding argument may be reinforced on the ground that a plaintiff's decision not to sue a particular co-tortfeasor will often be based on the conviction that he is less well equipped to bear any part of the loss than the other(s). Denial of contribution may thus serve sound notions of loss allocation by preventing a "strong" tortfeasor from shifting part of the accident cost to a substantially weaker tortfeasor; the most obvious illustration being a liability insurer seeking contribution from an uninsured tortfeasor. The very facts of the American Motorcycle case reveal just such a situation: namely, two presumably insured corporate defendants claiming contribution from the teenage victim's parents who were almost certainly uninsured against claims for negligent lack of supervision. Although this policy argument has been raised categorically against any form of

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[97]Michigan Comp. Law Ann. Section 600.2925 (1974).

contribution among tortfeasors,[98] it might be implemented at least--so the argument runs--where the plaintiff himself considered contribution undesirable.[99]

33. The argument to the contrary, however, strikes most observers as the stronger on balance. It is simply that a plaintiff should not have the unrestricted power unilaterally to decide how the loss should be allocated among several tortfeasors and thus to prevent, if he so wishes, any distribution among them. In truth, the "joint judgment" rule perpetuates the worst feature of the old common law principle of no-contribution by giving this enormous, uncontrolled power to plaintiffs. If indeed there are situations in which contribution would be against public policy, that determination ought to be made by the law, not the plaintiff, granting a specific immunity or prohibiting contribution.

Besides, the "joint judgment" rule may tend to discourage settlements, since a settlor is disqualified from claiming contribution. The risk he takes of settling for more than his due share is indeed somewhat increased under comparative since he would have to guess right not only the total amount of the damages, but also his own relative share of fault. That the prejudicial

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[98]James, Contribution Among Joint Tortfeasors: A Pragmatic Criticism, 54 Harv. L. Rev. 1156 (1941) which elicited a rebuttal from Gregory, Contribution Among Joint Tortfeasors: A Defense, 54 Harv. L. Rev. 1170 (1941). Recently, Weir 9 Intern'l Encycl. Comparative Law [hereafter cited Encyclopedia], ch. 12, at 78) sided with James by advocating abolition of contribution, if not altogether, at least by insurers and other "excellent loss-spreaders."

[99]It is all the more remarkable that the Court's opinion in American Motorcycle barely adverted to this aspect, merely guarding itself against any implication that it endorsed filial claims of this sort (at 607).

effect on settlements is not a figment of the imagination is documented by the special legislative waiver of the requirement that it was felt necessary to pass in order to facilitate speedy settlements after the Baldwin Hills Dam disaster in 1963.[100]

The trend has, therefore, been decisively against perpetuation of the "joint judgment" rule. Michigan long ago first mitigated it, as already pointed out, by authorizing joinder and later abolished the requirement altogether.[101] New York also abolished it, in train with introducing comparative negligence for plaintiffs[102] and comparative contribution among tortfeasors.[103] Legislation in California should follow the same course.

Abandoning the "joint judgment" rule opens the possibility of increased multiple litigation which would not only increase legal costs and impose an unnecessary burden on judicial administration, but also raise the prospect of inconsistent verdicts. A tortfeasor sued in the second action would not be bound by the verdict in the first with respect either to liability or shares

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[100]Stat. 1964, First Ex. Sess., ch. 1. Held constitutional in City of Los Angeles v. Standard Oil of California, 262 Cal. App. 2d 118, 68 Cal. Rptr. 512 (1968); appeal dism., 393 U.S. 267 (1968). An illustration of a settling tortfeasor's claim for "partial indemnity" since American Motorcycle is Sears, Roebuck & Co. v. International Harvester Co., 82 Cal. App. 3d 492, 147 Cal. Rptr. 262 (1978).

[101]Supra n. 97.

[102]C.P.L.R. Section 1401 (McKinney's Supp. 1974).

[103]Ibid.

of fault.[104] Since the responsibility of all participants in the accident must in any event be assessed in order to fix the shares of fault of any one of them (infra s. 41), it is all the more desirable to have all of them before the court in order to take advantage of their conceivably conflicting testimony and fix their shares of responsibility once and for all.

However, I do not consider it necessary to impose either incentives or penalties in order to promote joinder. For if the plaintiff chooses not to join a particular tortfeasor himself, it will in most cases be in the defendant's interest to do so. So long as the latter may freely implead any other person for the purpose of asserting a claim for contribution or indemnity--and such procedure is readily available under CCP Section 428.10(b)[105]--there is thus already a sufficient incentive based on self-interest which needs no reinforcement. Given the ample authority of California's long-arm statute,[106] nonresidence will rarely be a reason for the plaintiff's failure to join a particular tortfeasor, but in any event such an obstacle could no more be overcome by the defendant than the plaintiff.

35. If, contrary to the preceding recommendation, sanctions for compelling joinder were deemed desirable, two alterna-

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[104]Goldenberg & Nicholas, supra n. 95, at 49-50, add "any inconsistency of verdicts between the two actions could result either in unjust enrichment to the prior defendant (i.e., if in the later verdict the plaintiff's damages are found to be greater or the defendant's proportionate fault found to be less), or in the defendant being short-changed (i.e., if the later verdict found plaintiff's damages or proportion of fault smaller or the defendant's degree of culpability greater)."

[105]This procedure was hitherto precluded by the "joint judgment" rule.

[106]See CCP §410.10.

tives are available. One would debar a defendant from later claiming contribution in a separate action, at least if he had no reasonable cause for failing to cross-claim.[107] This would be analogous to the existing compulsory cross-claim provision regarding any "related cause of action [a defendant] has against the plaintiff."[108]

The other alternative would be to put pressure on the plaintiff by limiting his claim to each defendant's individual share only, in case of unjustifiable non-joinder of others. Admittedly, this method would in one respect be less drastic than the former, since it would not preclude the plaintiff from later bringing a separate action against those he originally omitted to sue. But in most situations in which he wished to spare a particular tortfeasor, e.g. because (as in American Motorcycle) he was a close relative, his reason for doing so would also preclude him from suing later. In any event, we are accustomed to respect a plaintiff's unwillingness to take the initiative in joining a particular party for whatever reason; and so long as the defendant he does sue has the opportunity of joining him as a co-defendant, there can be no great opportunity for abuse. Thus the plaintiff's decision against joinder need not be at the defendant's expense since the latter has always the means to defuse it.

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[107]Goldenberg & Nicholas, supra n. 95, at 50-53. Such a provision is contained in the Proposed Statute of the State Bar (Section 6) and SB 1959 (proposed CCP Section 881). It was adopted by the Ontario Court in Cohen v. McCord [1944] 4 D.L.R. 753 (C.A.); Rickwood v. Aylmer (1957) 8 D.L.R. 2d 702 (C.A.).

[108]CCP Section 426.30(a).

36. Yet another ground for objecting to a plaintiff proceeding separately against different defendants is the abusive practice of verdict-shopping, i.e. testing his luck before several juries in the expectation of eventually collecting up to the highest verdict.[109] Under the English legislation which has been widely followed in the British Commonwealth, this practice was discouraged at the time of introducing contribution among tortfeasors by limiting plaintiff's recovery in subsequent actions to the amount awarded in the first, and depriving him of his legal costs unless the court is of the opinion that there is a reasonable ground for bringing the subsequent action.[110] Verdict-shopping, however, is not widespread because the contingent fee system discourages it, and because it is generally in the defendant's interest to join all other tortfeasors for contribution. No legislative change in this regard is therefore recommended.

37. RECOMMENDATION 5: Abolition of the "joint judgment" requirement for contribution.

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[109]See Note, Consequences of Proceeding Separately Against Concurrent Tortfeasors, 68 Harv. L. Rev. 697, 700-02 (1955).

[110]Law Reform (Married Women and Tortfeasors) Act 1936 s. 6 (3)(b). See Fleming, Law of Torts (5th ed. 1977) 242.43.

VI. THE INSOLVENT OR ABSENT JOINT TORTFEASOR

38. If one or more of several joint tortfeasors is unable to pay his full share of the damages, who should bear the burden of the shortfall? Three solutions are possible: (1) the plaintiff, (2) the solvent defendant(s), or (3) to distribute the shortfall among the solvent defendant(s) and any contributorily negligent plaintiff in proportion to their shares of fault. Alternative (1) is accomplished by limiting the liability of each tortfeasor to his own share only, in lieu of "joint and several" liability. In section III of this Study that solution was rejected, even in its application to plaintiffs guilty of contributory negligence, as incompatible with the Li rationale of distributing the accident cost proportionately to fault. The solvent defendant has no greater equity than the plaintiff to escape his share of the shortfall.

The flaw of solution (2) lies in the fact that it makes no allowance for the plaintiff's contributory negligence, if any. For there is no reason, compatible with the Li rationale, why a defendant should bear a share disproportionately larger to his fault than a contributorily negligent plaintiff merely because a co-defendant is unable to pay his own full share.[111] In sum, to

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[111]The State Bar draft Section 6(c)(and SB 1959: proposed CCP Section 880[c]) incorporates solution (2) but without stating any reason for excluding plaintiffs at fault. That that proposal passed without objection from the plaintiffs' bar (CTLA) is hardly surprising.

place the shortfall wholly on the solvent defendant would be as unfair to him as placing it wholly on the plaintiff would be to the latter. Neither solution is compatible with the principle of proportionate loss allocation.

39. The only sound solution compatible with Li is, therefore, to distribute the shortfall among the solvent parties, plaintiff as well as defendant(s), in the proportion of their respective shares of fault. Thus if the ratio between P, D_1 and D_2 was 25:50:25 and D_2 was insolvent, P's share would be increased by 1/3 and D_1's by 2/3 of the deficiency. This solution has been widely advocated by scholars,[112] enacted in several common law jurisdictions,[113] and recently adopted by the Uniform Comparative Fault Act (1977).[114] It was also approvingly commented on by Clark J. in the American Motorcycle case.[115]

40. How would that principle be translated into practice? As pointed out in Section III of this Study, the "joint and several" liability rule is the first, but not necessarily the final, step in the adjustment between plaintiff and defendant(s). If, to continue with the preceding example, D_2's insolvency is already known at the time of the trial, his share can, and should,

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[112]The originator was Gregory, Legislative Loss Distribution in Negligence Actions, 77-79 (1936). Others: Glanville Williams, Joint Torts and Contributory Negligence, Section 48 (1951); Foreword, supra n. 3, at 251-52.

[113]E.g. Rep. of Ireland: Civil Liability Act 1961 s. 28; cf. S. Afr.: Apportionment of Damages Act s. 8 (ii)[redistribution between solvent joint wrongdoers].

[114]Section 2(d).

[115]Supra n. 59, at 614.

be immediately redistributed between P and D_1 in the ratio of 1/3 and 2/3, as is indeed contemplated already under the existing statutory direction (CCP Section 875[b]) to administer contribution "in accordance with the principles of equity."[116]

There is, of course, no reason for applying a different principle if the insolvency becomes known only later. But in that event a supplementary judicial order would be needed to reallocate the insolvent's share. This raises no serious administrative problem since D_2's share would already have been fixed by the jury's verdict; the matter can, therefore, be expeditiously dealt with by motion. The Uniform Comparative Fault Act (1977) Section 2(d) properly suggests a time limit for such a motion, such as one year after judgment in the original action, and specifically provides that the party whose share is reallocated remains "subject to contribution and to any continuing liability to the claimant on the judgment."

41. A related problem is how to deal with absent tortfeasors. The California Supreme Court in American Motorcycle expressly approved the revised BAJI instruction (No. 14.90) that juries assess shares of responsibility among all responsible participants of the accident, whether or not joined as parties to the litigation.[117] It would seem proper that, rather than

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[116]That this provision has the purpose of determining "pro rata" shares by first excluding insolvent tortfeasors is expressly mentioned in the Comment to the Uniform Contribution Among Tortfeasors Act Section 2 (1955). The procedure is illustrated by the English case of Fisher v. C.H.T. Ltd. (1966) 2 Q.B. 475, 480-81 (C.A.).

[117]At 590 n. 2.

adding the absent tortfeasor's share to the remaining defendants alone, that share be distributed proportionately among them and any contributorily negligent plaintiff.[118] The absent defendant would, of course, remain liable to contribution, though free to relitigate his liability since he is obviously not bound by res judicata or issue estoppel. If the claim for contribution is successful, the latter's share would be redistributed among the plaintiff and the defendants in the original action who had provisionally absorbed it. Since the plaintiff is directly interested in such a contribution claim, he should have a right to initiate it and/or become a party co-plaintiff.

An alternative approach, espoused by the Uniform Comparative Fault Act, is to limit the allocation of shares to the litigating parties. Ignoring "absent tortfeasors" is defended on the ground that "it cannot be told with certainty whether [such a] person was actually at fault or what amount of fault should be attributed to him, or whether he will ever be sued . . ."[119] The effect of this proposal, it will be noted, is in practice identical with the first-mentioned proposal of distributing the share of the absentee among the remaining

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[118]The State Bar draft Section 6(c) and SB 1959 (proposed CCP Section 880[c]) would distribute the absentee shares only among the remaining "judgment debtors" (i.e. defendants): see also comment A to Section 3. As already pointed out in relation to the same proposal for uncollectible shares of party defendants (supra n. 111), this does not hold the scales evenly between faulty defendants and plaintiffs.

[119]Comment to Section 2. It is also--rightly--pointed out that "both plaintiff and defendants will have significant incentive for joining available defendants who may be liable."

defendants and any plaintiff at fault.[120]

42. RECOMMENDATION 6: The share of any insolvent or absent tortfeasor shall be distributed among the remaining defendants and the plaintiff (if at fault) in proportion to their respective shares of responsibility.

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[120]A difference would arise only if under the first-mentioned proposal the absentee's share was distributed only among the defendants, excluding any plaintiff at fault.

VII. THE SETTLING JOINT TORTFEASOR

43. Settlement with one of several joint tortfeasors raises two principal issues: (1) the finality of the settlement vis-a-vis the remaining tortfeasors, amount the plaintiff can recover from those other tortfeasors. Varying answers, reflecting continuing shifts in assessing this situation, have been forthcoming.[121]

The original version of the Uniform Contribution Among Tortfeasors Act (1939) espoused the principle of equality among tortfeasors by providing that the settling tortfeasor(s) remained liable for contribution in the amount by which his share exceeded the dollar value of the settlement. The settlement could be made final only by stipulating for a reduction of the remaining tortfeasors' liability by the amount of S's pro rata share.[122] Only three States adopted this version of the Act, a common explanation being that it discouraged settlements by providing little incentive to either S or P to settle.

44. Under Dean Prosser's direction, the second version of the Uniform Act (1955) therefore abandoned this approach and

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[121]See generally: Comment, Settlement in Joint Tort Cases, 18 Stan. L. Rev. 486 (1966). Comparative: Encyclopedia, supra n. 98, Sections 100-01, 125-26.

[122]Section 2. Adopted by Arkansas, Hawaii and South Dakota; also Martello v. Hawley, 300 F.2d 701 (D.C. Civ. 1962). As an alternative to "pro rata" reduction, reduction by the plaintiff's share of fault was alternatively countenanced.

provided for (1) finality of a good faith settlement vis-a-vis any other tortfeasor, D as well as P, and (2) reduction of D's liability only by the amount stipulated in such settlement or actually paid, whichever was the larger. This version was adopted by a greater number of States, including California,[123] but it is far from clear whether it was this feature rather than an increasing disenchantment with the common law rule of no-contribution which was the primary motive. The plaintiffs' bar has been the principal advocate of this solution, because an under-value settlement in good faith does not prejudice the plaintiff. On the other hand, it is clearly incompatible with the Li principle of each party bearing his own proportionate share of the loss and thereby unfairly disadvantages the non-settling tortfeasors by a transaction to which they are not a party and in which they have no voice. Besides, while there is an undoubted public benefit in settlement, that benefit accrues only where all claims relating to the loss are included. Such, however, is not accomplished by the 1955 version because P is free to litigate with the remaining tortfeasors. The saving of "transaction costs" (principally legal and court expenses) in settling merely with one joint tortfeasor is too marginal and speculative to justify the rule in face of the Li principle.

45. Accordingly, there has been a swing of the pendulum to the more moderate view that, while the settlor (S) should be free from claims for contribution, the plaintiff's recovery from the other tortfeasors should be reduced by S's full share of

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[123]CCP Section 877.

fault. This formula, long advocated by scholars,[124] has by now acquired a large following in legislation,[125] as well as independent judicial decisions;[126] it has also been adopted by the Uniform Comparative Fault Act (1977) but not by draft bills endorsed by the plaintiffs' bar.[127] It is clearly more compatible with the Li rationale than the "pro tanto" reduction rule in that it limits the nonsettling tortfeasors' liability to their own proportionate shares, unaffected by the settlement to which they were not privy and in which they had no voice.[128] Surprisingly, however, the California Supreme Court in American Motorcycle[129] broke with the Li rationale a second time[130] by adopting the Contribution Act formula of "pro tanto" reduction also for "partial indemnity." It did so obiter, without the benefit of

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[124]Gregory, Legislative Loss Distribution in Negligence Actions, 78 (1936); Williams, Joint Torts and Contributory Negligence, 416 (1951); Foreword, supra n. 3, at 257-58; Goldenberg & Nicholas, supra n. 95, at 53; Kikel, Comparative Negligence, Multiple Parties and Settlements, 65 Calif. L. Rev. 1264 (1977).

[125]Arkansas, Hawaii, New York, Rhode Island, South Dakota, Texas, Utah, Wyoming.

[126]E.g. Pierringer v. Hager, 21 Wis. 2d 182, 124 N.W.2d 106, 110-12 (1963); Theobald v. Angelos, 44 N.J. 228, 208 A.2d 129 (1965); Gomes v. Brodhurst, 394 F.2d 465 (3d Civ. 1967).

[127]The State Bar draft Section 10(a) and SB 1959 (proposed CCP Section 884[a]) are identical with the current version of CCP Section 877(a). The comment in the State Bar draft does not even alert the reader to alternatives!

[128]For the same reason, it is also preferable to "pro rata" reduction which had been the first choice of the Uniform Contribution Among Tortfeasors Act (1939) (supra at n. 116). Gomes v. Brodhurst, 394 F.2d 465 (3d Civ. 1967, Virgin Isl. law without statutory guidance) specifically preferred "fault" to "pro rata" reduction and argued that its effect on settlements was the same.

[129]Supra n. 59, at 603-04.

[130]As pointed out by Clark J. who preferred the view recommended in the present Study (at 613-15).

briefing or argument,[131] and without any extended discussion beyond invoking the pro-settlement argument which, as already pointed out, does not really support its weight.

46. The alternative solution of reducing the plaintiff's recovery by the full amount of the settlor's full share does, however, raise the question of why the plaintiff should in this instance bear the whole burden of any deficiency (regardless indeed of whether he was himself contributorily negligent), when in situations not involving a settlement the burden would either be shared with the remaining defendants,[132] or placed entirely on the latter (depending on whether the plaintiff was contributorily negligent or not).

There are several reasons for drawing this distinction. The plaintiff remains, of course, the sole arbiter whether to settle and, if so, for how much. If he does not wish to assume the risk that the settlement is subsequently determined to be under-value, he need not settle at all. On the other hand, he is given a strong incentive to drive the hardest bargain with the settlor and not to prejudice the remaining tortfeasors by a settlement that is either collusive, deliberately discriminatory, or unintentionally inadequate. This self-regulatory incentive is clearly more effective than the requirement of "good faith" under the current California statute and the Uniform Contribution Act from which it is derived.

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[131]See Clark J. at 610 n. 1. Lemos v. Eichel, 83 Cal. App. 3d 110, 147 Cal. Rptr. 603 (1978) held that reduction for plaintiff's fault is made prior to reduction of settlement amount. This is clearly correct though less advantageous to plaintiffs.

[132]According to the recommendation in Section V of this Study.

47. Actually, there has been little occasion for clarifying the meaning of "good faith" in this context.[133] Clearly the burden of proving lack of good faith is in practice a heavy one as long as courts are persuaded that settlements should be encouraged in pursuit of the statutory policy underlying the "pro tanto" rule.[134] If the consideration for the settlement approximates the plaintiff's best estimate of the settlor's share of liability, the requirement is obviously satisfied. But it seems also to be common ground that a settlement up to the settlor's insurance coverage will pass muster, even though it falls far short of the settlor's share.[135] Why should a plaintiff bear the whole deficiency in such a case, when he would only have to bear a proportionate share if he declined to settle? Evidently, a plaintiff who did so must have reason for thinking

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[133]The Uniform Acts Annotated contain no case citations whatever to this phrase. In California, it has been explored only in River Garden Farms v. Superior Court, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972) and Stambaugh v. Superior Court, 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976).

[134]Clark J. argued (at 610 n. 2) that the good faith requirement in practice tends to discourage settlements and thus defeats the rationale of the "pro tanto" rule. Sanctions for lack of good faith are explored by Friedman J. in River Garden Farms v. Superior Court, supra n. 133, depending on whether the plaintiff and the settlor, or either of them alone, was implicated. It should be noted that, due to California's "joint judgment" rule, a settlor still cannot be sued for contribution even if the settlement is set aside.

[135]E.g. Stambaugh v. Superior Court, supra n. 133, at 238-39: "But we opine that it would be a rare case indeed where, as here, a joint tortfeasor who was the immediate causative agent of the claimant's injuries, who settles for the full amount of his insurance coverage, may reasonably be charged with lack of good faith under Section 877."

that it would still be advantageous for him to do so: perhaps because it guarantees him a partial recovery and cushions him against the risk of loss from an unfavorable judgment in subsequent litigation; perhaps because he thinks it worth his while to eliminate prejudicial testimony or even to induce the settlor to give testimony slanted in the plaintiff's favor against the remaining defendants.[136] Most important, however, is that the plaintiff is under no pressure whatever to enter such an under-value settlement if he does not wish to assume the financial risk of the deficiency.

48. Finally, the plaintiff should be rewarded by being allowed to keep the whole of any over-value settlement, even if he would in the end thereby receive more than a simple satisfaction of his loss.[137] Any other rule would create a no-win situation which would tend to diminish his incentive to settle. Nor does the windfall aspect present a serious argument to the contrary. The purpose of the one-satisfaction rule is to prevent the plaintiff from unjustly enriching himself at the expense of the defendants, but here that principle is not violated: the non-settling defendants will still not be required to pay any more than their apportioned shares and the settlor has bought his peace.

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[136]So-called "Mary Carter" or "sliding scale recovery agreements" have indeed prompted judicial or even legislative protection for the remaining defendants: e.g. Calif. CCP Section 877.5. See Professor G. Schwartz's Report to your Committee (p. 110-113) on the California Citizens' Commission recommendation 4B-2 to "prohibit Mary Carter" agreements. If anything, the recommended rule will tend to discourage such collusive arrangements far more than the present rule.

[137]So held in Theobald v. Angelos, 44 N.J. 228, 239; 208 A.2d 129, 135 (1965); see Kikel, supra n. 124, at 1277-79.

49. RECOMMENDATION 7: A release entered into by the plaintiff and a tortfeasor shall discharge the latter from all liability for contribution, but the plaintiff's claim against the remaining tortfeasors shall be reduced by the amount of the released tortfeasor's share of the loss.

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This exhausts those aspects of comparative fault specifically raised by American Motorcycle. There remain, however, a few other multiple party problems in the wake of the Li decision which it would be proper to deal with in the course of comprehensive legislation in this area.

VIII. IMMUNITIES AND WORKERS' COMPENSATION

50. A right of contribution exists only among parties who are jointly liable for the same injury. This condition is not satisfied if the party from whom contribution is sought is not liable to the tort victim on account of an immunity. Common examples are when that party is the spouse, parent or child of the victim.[138] In a few jurisdictions, the view has been taken that such immunities may not defeat contribution if their rationale is linked exclusively to direct claims by the victim, e.g. fear of collusion between spouses at the cost of the defendant's liability insurer,[139] a concern which would not extent with the same force, or at all, to contribution claims; most jurisdictions, however, apply the immunity to both claims. Hitherto the problem has not been faced in California because, prior to American Motorcycle, contribution was permitted only among parties held liable in a joint judgment. Besides, the problem is now of lesser dimension than it would have been 20 years earlier because most of the more common immunities figuring in tort litigation have, in the meantime, been abolished in California, e.g. the family immunities, charitable immunity, the guest statute and

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[138]See Prosser, Law of Torts, 309 (4th ed. 1971).

[139]Ibid., n. 75.

some aspects of sovereign immunity.[140]

51. Several solutions are possible.[141] One is to hold immunities on principle inapplicable to claims for contribution. Such was apparently the decision of the New York Court of Appeals when in Dole v. Dow Chemical Co. it allowed a claim for "partial equitable indemnity" against the plaintiff-employer notwithstanding the latter's tort immunity under the workmen's compensation act.[142] Most courts, however, refuse to permit contribution (as distinct from indemnity) from the plaintiff's employer or workmen's compensation insurer on the ground that contribution would erode the employer's statutory protection for which he bargained as a trade-off in return for no-fault benefits to his employees.[143] As against this, however, the third-party defendant has to bear a larger share of the tort liability through the fortuity that the other culpable actor happened to be entitled to a personal immunity vis-a-vis the tort victim.

52. There are several ways in which the third-party's predicament can be eased without infringing the other's immunity. But all of these are at the expense of the tort victim. First,

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[140]Remember that in American Motorcycle, the claim for contribution was made against the victim's parents. Such a claim would have foundered prior to Gibson v. Gibson, 3 Cal. 3d 914, 92 Cal. Rptr. 288 (1971), on the ground of family immunity. A number of courts have decided to retain parental immunity from claims for negligent supervision, principally in order to block claims for contribution by other insured defendants: see e.g. Holodook v. Spencer, 36 N.Y.2d 35, 324 N.E.2d 338 (1974).

[141]Comparative: Encyclopedia, supra n. 98, Sections 87-104.

[142]Supra n. 91.

[143]See Larson, 2A Law of Workmen's Compensation, Section 76.00; Prosser, supra n. 138.

the immune party could be treated like a released tortfeasor in accordance with the recommendation of Section VI of this Study, i.e. by reducing the plaintiff's recovery from the third-party by the former's share of fault. This solution is not only unduly prejudicial to the tort victim, but also based on an improper analogy: the underlying rationale regarding a settling tort-feasor's share is to protect the other defendants against collusive releases, whereas the immunities here considered exist entirely independently of the plaintiff's voluntary choice. There is no more reason to deny a faultless plaintiff full compensation from a tortfeasor when the other culprit has an immunity than when the other is insolvent.

A less prejudicial alternative would be to adopt the same formula as recommended in Section 42 of this Study for dealing with the share of an insolvent tortfeasor, i.e. to distribute that share ratably among the remaining liable parties, including a contributorily negligent plaintiff. This could be accomplished by simply disregarding, from the outset, the share of the immune party in fixing the liability of the other defendants (and a contributorily negligent plaintiff), though to do so would deviate from the usual procedure of requiring the jury to assess the shares of all culpable actors, whether they are party defendants or not.

Workers' Compensation

53. The problem is most acute in the context of workmen's compensation. This is so not only because the employer's immunity is far and away the most common in modern accident litigation; it is aggravated by the fact that the accident victim becomes entitled

to compensation benefits from his employer, as well as to tort damages from the third party. How are these two basically incompatible systems (workmen's compensation and tort) to be harmonized?[144] This question calls for consideration when the employer or the employee or both negligently contributed with the third-party in causing the employee's injury.

54. Prior to Li, the position in California was as follows:[145] An employee's contributory negligence, while not affecting his right to compensation from his employer, barred any tort recovery from a culpable third party. On the other hand, an employee free from fault could recover tort damages from a third-party tortfeasor, reduced only by the workmen's compensation benefits previously received.

If the employer was at fault, whether on account of managerial negligence or vicarious liability for the negligence of his agents or servants, he was not--as already mentioned--liable for contribution, but in Witt v. Jackson,[146] he also lost his right to recoup from the third party the compensation benefits paid to the injured employee. Thus, the negligent employer and the third party shared the loss, although by no means in

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[144]A comparative conspectus of the treatment of these problems in different countries is found in Fleming, Intern'l Encyc. Comparative L., vol. 15 (Labour Law) ch. 9 (Tort Liability for Work Injury), 1975, Sections 56-71.

[145]See Notes, Third Party and Employer Liability After Nga Li v. Yellow Cab Company for Injuries to Employees Covered by Workers' Compensation, 50 So. Cal. L. Rev. 1029 (1977) [hereafter cited Third Party]; Worker's Compensation/Third-Party Lawsuits: The Impact of the Li Comparative Negligence Doctrine, 11 U.S.F.L.Rev. 541 (1977) [hereafter cited Worker's Compensation].

[146]57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961).

proportion to their shares of fault or even equally; on the other hand, the employee did not "double-recover" because, whether his employer was negligent or not, he (the employee) had to give credit against the tort damages for compensation benefits received. In sum, the employer's negligence enured solely to the third-party's advantage by reducing his total liability by the amount of the compensation benefits paid.

The situation worked out differently where compensation benefits were claimed after the third-party's liability was finalized. In that event, Labor Code Section 3861 allows the employer or his insurance carrier a credit against the damages recovered from the third party. However, in Roe v. Workmen's Compensation Appeal Board,[147] the Supreme Court (shortly before Li) held that, if the employer's negligence concurred with the third party's, it was preferable to deny the employer his statutory credit, rather than deny the employee double-recovery. In this instance, therefore, the employer's negligence enured to the benefit of the employee, since (at least in the absence of statutory authority) the benefit of the later compensation could not be passed on to the third-party like the benefit of compensation received prior to judgment or settlement with him.

55. I propose first to consider the effect of Li on the liability of a negligent employer and third-party in cases where the employee was not also contributorily negligent.[148]

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[147]12 Cal. 3d 884, 528 P.2d 771, 117 Cal. Rptr. 683 (1974).

[148]Besides the two articles cited supra n. 139, various alternatives were also systematically, and first, discussed by Peyrat, Comparative Negligence in Third Party Cases, 3 Cal. Workers' Comp. Rep. 99 (1975).

The Li rationale might well suggest that the third party's liability should no longer exceed his own share of negligence. That could be accomplished either by allowing the third-party contribution from the employer, or limiting the employee's tort claim to the third party's share only. Either solution has been firmly rejected by different Courts of Appeal.[149]

56. Contribution from the employer has been opposed both on doctrinal and policy grounds. As for the first, contribution assumes joint liability, not just joint negligence; and the employer happens to be immune from tort liability.[150] Besides, to subject the employer to contribution would entail the ridiculous result that if the employer is the only negligent party, he need only pay his workers' compensation; but if a negligent third party contributed to the injury, the employer must pay his share of the jury verdict.[151] As for the second, contribution would undermine the employer's immunity in violation of a basic tenet of worker's compensation. The "trade-off" for the employer's no-fault liability for compensation benefits to his employees was, and is, his immunity from any tort claim with respect to the injury. To expose him to contribution from the third party would taint worker's compensation with tort law. It would increase the

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[149]E. B. Wills Co., Inc. v. Superior Court, 56 Cal. App.3d 650, 128 Cal. Rptr. 541 (1976) (no contribution); Christensen v. Kaiser Aluminum & Chemical Corp., 69 Cal. App.3d 922, 138 Cal. Rptr. 426 (1977; aff. by Sup. Ct. with order against publication of opinion); Arbaugh v. Procter & Gamble Mfg. Co., 80 Cal. App.3d 500 (1978) (joint and several liability).

[150]Labor Code Section 3601.

[151]Brown v. Dickey, 397 Pa. 454, 155 A.2d 836, 839 (1959).

risk and cost of the employer and require him to carry additional insurance. Some jurisdictions, it is true, have condoned violation of the employer's immunity by allowing indemnity claims based on a contractual relationship between the employer and the third party,[152] but California emphatically repudiated this trend in 1959 by specifically legislating against indemnity claims, except when based on an express written contract.[153] This prohibition would cover also claims for "partial indemnity" within the meaning of American Motorcycle.[154] In sum, the reason for hitherto denying contribution (and indemnity) against the employer was not the all-or-nothing rule discarded by Li but an independent policy of limiting the employer's liability for work injuries.[155] Contribution, under whatever label, is not therefore acceptable.[156]

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[152]See Larson, 2A Law of Workmen's Compensation, Section 76.30-76.53; Larson, Workmen's Compensation--Third Party's Action Over Against Employer, 65 Nw.U.L.Rev. 351 (1970). In California: e.g. Baugh v. Rogers, 24 Cal.2d 200, 148 P.2d 633 (bailor-bailee). The U.S. Supreme Court lent kudos to this theory in allowing indemnity to an unseaworthy ship against the longshoreman's employer notwithstanding the immunity provision of the Longshoremen's and Harbor Workers' Compensation Act Section 5: Ryan Co. v. Pan-Atlantic Corp., 350 U.S. 124, 76 S.Ct. 238 (1955). The doctrine was nullified by amendment of the Act in 1972. A product manufacturer's claim to an "implied right of indemnity" from a purchasing employer was recently negatived in Olch v. Pacific Press & Shear Co., 19 Wash. App. 89 (1978).

[153]Labor Code Section 3864. This amendment was passed to nullify the rationale of San Francisco Unified Sch. Dist. v. California Maintenance Co., 162 Cal. App. 2d 434, 328 P.2d 785 (1958).

[154]Arbaugh v. Procter & Gamble Mfg. Co., supra n. 149, at 507.

[155]So held in E. B. Wills Co., Inc. v. Superior Court (supra n. 149).

[156]Notwithstanding Dole v. Dow Chemical Co., supra n. 91; Skinner v. Reed-Prentice Div. Package Mach. Co.

57. Another alternative for limiting the third party's liability to his own share of fault would be to abandon the "joint and several" liability rule and reduce the employee's tort recovery from the third party by his employer's share of negligence. While contribution would promote the Li rationale at the cost of the employer, this formula would do so at the cost of the employee. The only argument for it is that this is not an unfair price to exact in return for the employee's assured compensation benefits; in other words, that the price consists in giving up all tort claims whatever with respect to his employer's negligence and absorbing that share himself for all purposes.[157] It will be recalled that this formula is actually recommended in Section 49 of this Study for dealing with a settling tortfeasor's share, but, as already pointed out,[158] the two situations are hardly analogous: the plaintiff has a free choice whether to settle with any one of the tortfeasors and for how much; it is, therefore, not unfair to hold him to that bargain. In contrast, the particular employee has no choice whatever in dealing with his negligent employer; the latter's immunity is imposed by law and bargained for only in a purely theoretical-historical sense.[159] A closer analogy is that of a co-tortfeasor's insolvency, the risk of which is and should remain (as recommended in Section III

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[157]See Note, Third Party, supra n. 145, at 1042. This view has been adopted in the Ontario Workmen's Compensation Act (Rev. Stat. 1970 c. 505 s. 8 [11]) and the British Columbia Workmen's Compensation Act (Rev. Stat. 1960 c. 413 s. 11[6]).

[158]Supra Section 56.

[159]Contra: Murray v. U.S., 405 F.2d 1361, 1365-66 (D.C. Civ. 1968) which applied the settlement analogy to the instant situation.

of this Study) with the solvent tortfeasor(s), at any rate where the plaintiff is free from fault himself. Why should a tortfeasor be better off because someone else contributed to the injury than if he had been solely responsible? Finally, it may be urged that the object of the Li reform was to improve the position of plaintiffs, not to worsen it.[160] Accordingly, no change in the existing rule of unreduced tort liability by the third party[161] is here recommended.

58. If the Li rationale of each negligent actor bearing no more than his own share of responsibility cannot be implemented exactly in this context without violence to other competing policies, does it not at least call for some other modification(s) of the prior system of rules? Two possible modifications must here be considered.

The first concerns the Witt rule which used to disqualify a negligent employer from claiming any indemnity from the third party for compensation benefits paid. The BAJI Committee promptly amended the relevant jury instructions to reflect its view that a negligent employer could henceforth claim reimbursement from the third party for compensation benefits paid, reduced only by his own apportioned share of negligence.[162] This modification of

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[160] Arbaugh v. Procter & Gamble Mfg. Co., supra n. 149, at 507.

[161] Christensen v. Superior Court (supra n. 149). The reason for the Supreme Court's order against publishing the opinion of the Court of Appeal was most probably that this issue was being dealt with in American Motorcycle (supra n. 59). A year later, in Arbaugh v. Procter & Gamble Mfg. Co., supra n. 149, at 507, the Court considered itself bound by American Motorcycle.

[162] BAJI 15.14 (6th ed. 1977). See especially the Use Note, pp. 672-77.

the Witt rule has been criticized on the ground that it operates to reduce excessively a negligent employer's already limited statutory liability at the expense of a concurrently negligent third party whose liability is not so limited.[163] Suppose an employee is killed in an industrial accident caused in equal degrees by the negligence of his employer and a third party. A wrongful death action results in an award of $250,000 in favor of the survivors. Under Witt, the employer would have borne the whole of the compensation award, maximally $55,000; the remaining $195,000 would have been borne by the third party. Under the BAJI formula, the employer could have recovered $27,500 from the third party, with the result that the third party's share is now increased to $222,500. But not only would this formula result in excessively increasing the disparity between the shares of the parties; it is also wrong in principle: for the Li rationale calls for the application of the fault ratio to the total amount of the damages, rather than the amount of the employer's lien upon that amount--in other words, to the shares in which torts damages, not worker's compensation, should be borne.

59. Accordingly, the correct method of applying Li is to require the third party to reimburse the employer only to the extent that the compensation benefits have exceeded the proportionate share of the damages attributable to the employer's negligence. Thus in the preceding hypothetical, the employer would have been entitled to no reimbursement at all, since the benefits paid ($55,000) fell far short of his 50% share of the

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[163]Note, Worker's Compensation, (supra n. 145), at 577.

damages ($125,000). This formula has now been repeatedly endorsed by Courts of Appeal in preference to the BAJI proposal.[164] It is preferable to the Witt rule because, in cases where the employer's negligence is slight, but his compensation payments are relatively high, he may now force the third party to bear a share of the tort damages proportionate to his own larger share of fault. Suppose that the tort damages amount to $20,000 and the benefits to $8,000, the fault ratio being 10:90: Under Witt, the employer would have borne $8,000 and the third party $12,000; under the new formula, the employer will be entitled to reimbursement of $6,000. Not that this formula necessarily assures sharing in exact proportion to fault, as it does in the preceding example. For if the fault ratio were reversed, the employer would recover nothing but the third party--failing contribution--would still be left with $12,000 or 60% of the loss.

The recommended formula presents no practical problem in application, if the third-party claim was actually litigated: the verdict will fix both the plaintiff's total damages and the shares of fault. But a settlement would fix neither.[165] The employer might therefore be forced to take the matter to court. But even the Witt rule was contingent on a finding of negligence by the employer, and the Li rule applied to the lien (rather than the

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[164]Christensen v. Kaiser Aluminum & Chemical Corp., (supra n. 149); Arbaugh v. Procter & Gamble Mfg. Co., (supra n. 149). It is also the rule in France and Germany: see Fleming, supra n. 144, Section 29.

[165]It cannot even be assumed that the settlement represents a good faith estimate of the plaintiff's total loss instead of the third party's share of fault, with or without a deduction of the compensation benefits.

tort damages) would also require a finding of the parties' shares of fault. An additional finding of the total damages does not, therefore, substantially add to the administrative burden of the recommended formula.

60. The second modification suggested by Li concerns the employer's credit where the injured employee delays his claim for permanent disability under workers' compensation until after the civil liability of the third party has been disposed of. It will be recalled[166] that under the prior law, as decided in Roe shortly prior to Li, a negligent employer was disqualified from all credit for such later benefits against the prior civil recovery, on the ground that it was preferable to condone double recovery by the employee rather than permit the employer to profit from his wrong. Application of the preceding reimbursement formula (supra Section 63) to the Roe credit would tend to minimize the employee's double recovery. It is true that it would neither completely eradicate double recovery (to the extent that credit was still denied up to the employer's share of fault) nor that the benefit of the modification would enure to the third party, rather than the employer. But it is at least a step in implementing the Li mandate.

The plaintiffs' bar is opposed to any modification of Roe, its main argument being that it merely transfers a portion of the windfall from the pocket of the employee to that of the employer, and that the innocent employee is more deserving than

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[166]Supra Section 58.

the negligent employer.[167] For it will have been noticed that while the formula applied to reimbursement will not affect the employee's recovery, the formula applied to credit will. But the likely impact is much smaller than imagined by its opponents who assume reduction of the credit in accordance with the employer's fault, while, as previously pointed out, the correct formula would allow reduction only to the extent that the compensation benefits exceed the employer's share of the tort damages. In any event, the critics (are forced to) concede that the best solution would be to transfer the "windfall" to the third party, although its effect on employees would, of course, be the same.

61. To accomplish that result, a simple reform would be to introduce a legislative provision, analogous to the employer's reimbursement provision, allowing the third party to assert a claim against any future compensation award.[168] Besides eliminating double recovery, it would also dispose of the vexing jurisdictional problem raised by the employer's negligence. For, already in Roe, the Court suggested a legislative amendment to relieve the Workers' Compensation Appeal Board from having to decide whether the employer was negligent and thus forfeited his claim to credit.[169] The problem would be aggravated if the Board

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[167]E.g. Steinberg, The Argument on Associated Constr. & Engin. Co. v. WCAB, 5 Advocate No. 7, p. 1 (1977).

[168]Ibid. at 584; originally aired in Note, 4 Cal. Workers' Comp. Rep. 63 (1976). A somewhat analogous proposal to prorate workmen's compensation and tort damages (instead of basing the division on fault) was made in Note, Workmen's Compensation and Third Party Suits: The Aftermath of Witt v. Jackson, 21 Hast. L. J. 661 (1969).

[169]12 Cal. 3d at 892, 117 Cal. Rptr. at 689, 528 P.2d at 777.

also had to apportion shares of negligence.[170] By permitting the third party to raise these issues and have them disposed during the civil trial, issues of fault need no longer be injected into the adjudication of workers' compensation.

62. Another formula which would achieve the same result is to authorize contribution against a negligent employer, but not exceeding the latter's workmen's compensation liability. This would in effect subrogate the third party to the employee's compensation benefits paid and payble by the employer, just as under workmen's compensation acts in many states the employer's right of reimbursement is defined as a right of subrogation to the employee's rights against the third party.[171] A right of contribution so limited would respect the traditional policy of limiting the employer's liability to the workmen's compensation benefits, but make sure that the employer does not escape with paying less merely because the employee has not yet exercised his full rights against him by the time the civil claim is settled.

Such a limited right of contribution has long been practiced in Pennsylvania,[172] was recently adopted in Minnesota,[173]

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[170] If the third-party claim was settled (as in Associated Constr. & Engin. Co. v. W.C.A.B. (supra n. 167), the Board would also have to make a finding of the plaintiff's total damages, since it cannot be assumed that the settlement represented a good faith estimate of the total loss. This has been employed as an additional argument for retaining Roe, but loses much of its force if the recommended amendment were adopted.

[171] Even in California, it has been described as "merely a legislative recognition of the equitable doctrine of subrogation": De Cruz v. Reid, 69 Cal. 2d 217, 222 (1968).

[172] Mayo v. Fahs, 339 Pa. 180, 14 A.2d 105 (1940).

[173] Lambertson v. Cincinnati Corp., __Minn.__, 257 N.W.2d 679, 688-89 (1977).

and has had some following among federal courts in application to federal workmen's compensation statutes.[174] As Larson points out, "it postulates an optimum result" and probably represents "the fairest available compromise in the light of all the conflicting policy interests."[175]

63. A much more radical reform in the way of coordinating workers' compensation with tort liability is the proposal of the American Insurance Association[176] which takes a middle ground between the extremes of, on the one hand, abolishing all third-party claims[177] and, on the other, making the employer liable in contribution for the full amount of any tort judgment. The AIA proposes that all tort defendants (or at least all third-party product liability defendants)[178] be entitled to credit for the amount of workmen's compensation liability paid or payable to the

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[174]This goes back to the Third Circuit's opinion in Baccille v. Halcyon Lines, 187 F.2d 403 (1951), revd. on another ground: sub nom. Halcyon Lines v. Haen Ship Corp., 342 U.S. 282, 72 S.Ct. 277 (1952). The cases are discussed at length in Larson, supra n. 152, Section 76.22.

[175]Supra n. 174, at 14-311.

[176]See Epstein, Coordination of Worker's Compensation Benefits with Tort Damage Awards, 1977 Forum 464, address to ABA Section of Insurance, Negligence and Compensation Law, August, 1977.

[177]Such a proposal is outlined by Weisgall, Product Liability in the Workplace: The Effect of Worker's Compensation on the Rights and Liabilities of Third Parties, 1977 Wis. L. Rev., 1035.

[178]Both the AIA proposal (supra n. 175) and Weisgall's (supra n. 177) focus on the product liability third party. So does Ch. VII, Final Report, Interagency Task Force on Product Liability (1978). The major reason for isolating this problem is the relatively high incidence of these cases: 11% of all product liability accidents account for 42% of the total insurance premiums (Task Force, at VII-85).

injured employee, regardless of the negligence or other fault of the employer. The employer's right of reimbursement would be abolished, as would all claims for contribution or indemnity other than those provided for by contract.

This proposal has two great attractions: it dispenses with all consideration of fault on the part of the employer and eliminates all cross-claims, thereby simplifying the compensation procedure and reducing "transaction costs." California has hitherto stood pretty nearly alone in its apparent lack of concern over the complications resulting from injection of negligence into the workmen's compensation system, as evidenced by the Witt and Roe decisions.[179] By contrast, most other States have refused to deny a workmen's compensation lien to a negligent employer, not from motives of complacency with negligence, but so as to not burden the disposition of industrial accident injuries with investigations into fault. In other words, the clear majority view is that the cost of such investigations outbalances any deterrent or other salutory effect that a denial of the lien might conceivably have. The AIA proposal carries forward this important policy, though by denying a lien even to completely faultless employers. Anyway, complete faultlessness (managerial or vicarious) on the part of employers is rather rare, so that it is not inequitable to require all employers to bear a portion of the accident cost. The AIA proposal, by also denying the third party any contribution, thus eliminates all consideration of fault on the part of the

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[179]See Larson (supra n. 152), Section 75.22.

employer or the third party,[180] and dispenses with all cross-claims. It therefore differs fundamentally from the proposals previously here considered which, instead of ejecting fault notions from workers' compensation, sought to harmonize two systems. Since the employer and the third party are both likely to be insured and good loss distributors, the refinements of fault exact costs which many observers regard as unwarranted by any competing benefits. Your Committee should seriously ponder whether this is not a propitious time to undertake such a more fundamental reform, rather than a mere implementation of the Li rationale.

64. We must now consider the added complications of the employee's contributory negligence. First as to his rights against the third party. Whereas prior to Li, any such claim would have been totally barred, it is now merely reduced by his own share of negligence. If he has received workmen's compensation, that amount must also be set-off against his damages. It seems to be generally assumed that the benefits must first be set-off before the remainder is reduced by the appropriate ratio of fault, rather than vice versa. Suppose the verdict is $50,000, the compensation benefits $10,000 and the employee was 10% negligent. If compensation is set-off first, he will be entitled to $36,000 ($50,000-$10,000-$4,000); if set-off last, he could only recover $35,000 ($50,000-$5,000-$10,000).[181] The former order of deduction ought to be confirmed by statute.

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[180]But the victim's contributory negligence could still be considered in relation to his tort claim against the third party.

[181]See BAJI, p. 673,676.

65. What would be the effect of the injured employee's contributory negligence on the employer's claim for reimbursement of compensation benefits? It will be recalled that, according to current case law commended in this Study,[182] a negligent employer is entitled to reimbursement to the extent that his compensation payments exceeded his notional share of the total damages. His negligence may, of course, be either managerial ("personal") or vicarious. No cases, however, have so far explored the question of whether the injured employee's contributory negligence should be imputed to the employer just like that of any other employee so as to affect his right of reimbursement or credit.

The BAJI Committee assumed such imputation.[183] Thus, in the preceding example (Section 62) [where compensation amounted to $10,000, the verdict to $50,000, and the employee was 10% negligent], the employer would on that basis be entitled to $5,000, i.e. the difference between the benefits paid and the 10% share of the total damages.[184]

66. Alternatively, it may be argued that the third party is already credited with the 10% share of the injured employee so to reduce his total liability from $50,000 to $46,000 (supra Section 69). Why should he get a double credit by imputing that share also to the employer so as to reduce the latter's right of

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[182]Section 46.

[183]See p. 674, B1 and Example 4.

[184]BAJI example 4 would allow reimbursement of $9,000, based on the assumption, since refuted, that the percentage reduction is made on the lien rather than the total damages.

reimbursement?[185] Without imputation, the employer would--in the previous hypothetical--be entitled to recover all of his payments ($10,000). This would make no difference to the injured employee, but it would change the respective shares of employer and third party from $5,000:41,000 to 0:46,000.

There are two possible arguments against this solution. The first is that traditionally an employee's negligence has been imputed to the employer so as to impair the latter's right of recovery from third parties. There is no reason why the Li principle should change that policy, except that the employer's claim is no longer barred, but merely reduced. But this assumes that the employer has suffered an injury of his own, whereas in our context it is the employee who has suffered the injury and his negligence is already debited against the third party's liability. In other words, this is an entirely novel situation to which the doctrine of imputed negligence could never have been applied before, and it would be merely mechanical to extend that doctrine to the present situation.[186]

The second argument is that by reducing the third party's share, the formula tends to mitigate a little the gross inequity which the employer's immunity tends to inflict on third parties. This argument would, however, be stronger if, as BAJI had assumed, the percentage reduction were applied only to the employer's lien rather than to the total damages.

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[185]See Peyrat, supra n. 148, at 100 ("Situation ID").

[186]Remember Emerson's dictum "Consistency is the hobglobbin of little minds!"

On balance, the arguments for imputing the injured worker's negligence to his employer for the purpose of reimbursement are perhaps the stronger. Thus, however diffidently, adoption of this alternative is recommended.

67. RECOMMENDATION 8: (1) In the case of a work injury caused by the concurrent negligence of the worker's employer and a third party:

(a) the employer should be allowed to recover from the third party any part of his compensation liability that exceeds his notional share of the tort damages, and

(b) the third party should be allowed to claim contribution to the extent of the employer's share of fault or the employer's workmen's compensation liability, whichever is the smaller (Section 65);

(2) If the employee's negligence concurred with that of the third party, his negligence should be imputed to the employer so as to reduce his claim to reimbursement (Section 70);

(3) Alternatively, the employer's right of reimbursement should be abolished, regardless of whether he was negligent or not, but the third party's tort liability should be reduced by the amount of workmen's compensation paid or payable to the employee (Section 67).

IX. THE UNIFORM COMPARATIVE FAULT ACT

68. Most of the recommendations of this Study are embodied in the draft of the Uniform Comparative Fault Act, promulgated by the National Conference of Commissioners on Uniform State Laws in August, 1977. There are two good reasons for adopting that draft in its essentials, rather than embarking on an original drafting effort: first, the Uniform Act is the result of careful preparatory work and draftsmanship which it would be uneconomical to duplicate; second, uniformity entails obvious benefits by making available the combined interpretative experience of other States and eliminating conflicts problems.

69. The Act covers both comparative negligence and contribution among tortfeasors. If adopted in California, it would therefore put both matters on a statutory basis, a solution preferable to a mosaic of judicial decisions and statutory amendments. It would also require the repeal of the current version of CCP Sections 875-877, dealing with contribution among tortfeasors and releases.

70. (1) Section 1(a) of the Uniform Act enacts the principle of "pure" comparative negligence and Section 1(b) defines the scope of its application in an embracing definition of "fault." Notably, that definition includes strict tort liability, including breach of warranty, as well as reckless conduct in accordance with the recommendations of Section I of this Study. The inclusion of "unreasonable failure to avoid an

injury or to mitigate damages" would apply comparative negligence to situations like failure to use protective devices, like safety belts or helmets, if considered "unreasonable." Because conduct formerly classified as assumption of risk might now be deemed comparative negligence, it might be desirable to insert in the definition of fault in line 4 of Section 1(b) "violation of statute," following "breach of warranty."[187]

(2) Section 2(a) of the Act lays down a procedure of special interrogatories for the jury regarding the allocation of shares of responsibility between the parties, both for purposes of comparative negligence and contribution among tortfeasors.

Section 2(b) prescribes as the two criteria for such allocation (1) the "fault" of each party, and (2) the "extent of [its] causal relation" to the damages claimed; the second criterion provides a possible solution to the "apples and oranges" dilemma of comparing fault and strict liability.[188]

Section 2(c), inter alia, confirms the rule of joint and several liability.

Section 2(d) enacts a procedure for reallocating the uncollectable share of an insolvent party among the other parties, as recommended in Section IV of this Study.

(3) Section 3 deals with the problem of set-off, between parties who are either insured or uninsured, along lines set out at length and recommended in Section 7 of this Study.

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[187]See Foreword, supra n. 3, at 261-67.

[188]See supra, Section 10.

(4) Section 4(a) of the Act creates a right of contribution, enforceable either in the original action or in a separate action. It therefore rejects the requirement of a joint judgment. Section 4(b) specifically authorizes contribution claims by settling tortfeasors. In both respects, it would change the law of CCP Section 875 in accordance with recommendations of Section IV of this Study.

(5) Section 5 deals with the enforcement of contribution, including the period of limitation.

(6) Section 6, prescribing the effect of releases, corresponds to CCP Section 877, except that the plaintiff's claim against other defendants is to be reduced by the released tortfeasor's equitable share in accordance with the recommendation in Section VII of this Study, rather than by the amount of the settlement.

(7) Section 9 on severability may be omitted. Section 11 would repeal CCP Sections 875-877.

71. The Uniform Act does not deal specifically with the problem of immunities or the workmen's compensation syndrome, except in a comment to Section 6 which briefly canvasses several possible solutions. Section VIII of this Study also suggested alternative solutions; if one of these were ultimately enacted, it would more appropriately be placed in the Labor Code, Div. 4 which deals specifically with the interaction of workmen's compensation and tort liability rather than in the CCP as part of the general comparative fault legislation.

X. STATE BAR DRAFT AND S.B. 1959 (ZENOVICH)

72. An alternative bill drafted by a Committee of the California State Bar was introduced by Senator Zenovich (March 28, 1978) as SB 1959.[189] Like the Uniform Act, it proposed a codification of comparative negligence, contribution among tortfeasors and releases. It is, however, more detailed than the former, especially in its prescription of procedures, and dovetailed into the California CCP of which it would become part as Title II of Part 2, Sections 875-885.

I propose to draw attention to its most salient features, some of which are explained and emphasized in the comments accompanying the State Bar draft, while others only emerge by contrast with the Uniform Act.

73. (1) Section 1 (SB Section 875) is clearly limited to tort (and nuisance) actions, whereas the Uniform Act applies to all claims "based on fault" for "personal injury or death to person or harm to property." Thus, unlike the latter, the California draft may be applicable to claims for economic loss (e.g. from misrepresentation), but would presumably exclude actions for breach of contract, including warranty. (Breach of warranty is specifically included in the Uniform Act's definition

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[189] Proposed Statute re Comparative Negligence and Contribution, recommended by the State Bar Standing Committee on Administration of Justice, August 1977. (The draft remains under consideration by that Committee.) SB 1959 died in the Rules Committee at the end of the 1978 legislative session.

of fault: Section 1[b]). But like the Uniform Act, it does apply comparative negligence to claims based on strict liability.

The exclusion of contract actions applies not only to the issue of comparative negligence but also to contribution. It therefore disqualifies claims for contribution between one liable in contract and another liable in tort (and, of course, between persons liable only in contract). This creates a serious gap which has recently been closed in England by the Civil Liability (Contribution) Act 1978.[190]

(2) Section 2 (SB Section 876) defines fault to include "breach of any duty of [a] person to himself or others." This is, to say the least, infelicitous since one cannot owe a duty to onesself.[191]

(3) Section 3 (SB Section 877) prescribes the special verdict procedure, comparable to Section 2 of the Uniform Act. One notable difference is that the California draft requires a comparison of fault between all "tortfeasors" (following American Motorcycle), while the Uniform Act deliberately confines comparison to the litigating "parties" alone. The significance of this difference is revealed in Section 6 which deals with the "absent" share. The result runs counter to the recommendation of this Study.[192]

(4) Section 4 (SB Section 878) requires set-off without qualification and without so much as a word of explanation for

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[190]See also Law Commission, Report No. 79 (1977).

[191]See Daly v. General Motors Corp. (supra n. 20) at 735.

[192]Supra, Section 24.

ignoring the near-universal disapproval of set-off between insured parties. Although the draft is in several other respects tilted in favor of plaintiffs, this section has incurred the hostility of CTLA, and should be rejected.

(5) Section 5 (SB Section 879) enacts a right to contribution, affirms the joint-and-several-liability rule, and preserves jury trial.

(6) Section 6 (SB Section 880) deviates from the Uniform Act by reallocating the uncollectible share of a tortfeasor (insolvent as well as "absent") proportionately among the remaining "judgment debtors", but apparently not including a plaintiff at fault. This solution does not hold the scales evenly between negligent plaintiffs and defendants and runs counter to the recommendation of Section V of this Study.

(7) Section 7 (SB Section 881) authorizes cross-complaints or a later separate action for contribution subject to certain conditions.[193] It also provides for a right of intervention by anyone who may be called upon to make contribution (Sub.-§[d]).

(8) Section 8 (SB Section 882) lays down that each party's equitable share be based on fault.

(9) Section 9 (SB Section 883) provides for a problem omitted by the Uniform Act: can a non-party relitigate the extent of the plaintiff's award? Answering yes, how is the reduction, if any, to be redistributed?

(10) Section 10 (SB Section 884) reenacts in substance the existing rules of CCP Section 877 on releases. In particular,

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[193]See supra Section 34.

it adheres to the rule that any non-settling defendant's liability is reduced only by the amount of the settlement, subject only to the control that such settlement was in good faith. This solution obviously favors plaintiffs and is, therefore, supported by CTLA. By contrast, the Uniform Act proposes to reduce the remaining defendant's liability by the settling tortfeasor's equitable share, if greater than the amount of the settlement. For reasons previously stated, this Study prefers the latter solution.[194]

(11) Section 11 (SB Section 885) is an uncontroversial definition section.

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[194]Supra Section VI.

EXHIBIT D

Daly v. General Motors Corporation, 20 Cal. 3rd 725 (1978)

Since the Daly case is the latest point in the products liability evolution in California, there should be some understanding of the state of the law prior to the decision.

Generally to state a cause of action for strict products liability, the plaintiff must show:

1. Defendant manufactured or sold a product

2. The product had a defect which made it dangerous to the user

3. While the product was being used in an intended or foreseeable manner, plaintiff suffered injury or property damage as a result of the defect in the product.

Also generally contributory negligence was not a defense to strict products liability but assumption of risk was a defense. Prior to the case of Li v. Yellow Cab Co., 13 Cal. 3rd 804 (1975), the doctrine of contributory negligence was a defense to an action based upon negligence, but as stated above was not a defense to strict products liability actions.

In Li v. Yellow Cab, the plaintiff driver and defendant driver were driving in opposite directions on the same street. Immediately prior to an intersection plaintiff (attempting to enter a gas station) turned left in front of defendant's cab. Defendant's cab had entered the intersection on a yellow light and was traveling at an unsafe speed. However, the plaintiff's left turn was made at a time when a vehicle was approaching from the opposite direction so close as to constitute an immediate hazard. Li sued Yellow Cab but the trial court denied recovery because of Li's contributory negligence. On appeal, the California Supreme Court allowed some recovery through the abolition of the defense of contributory negligence and established in California the doctrine of comparative negligence. The purpose of the new doctrine is to assign responsibility and liability for damage in direct proportion to the amount of negligence of each of the parties.

The reasoning of the Court in Li was to promote the equitable allocation of loss among all parties legally responsible in proportion to their fault (Daly v. General Motors Corp., 20 Cal 3rd 725, 737 [1978]). The Court in Daly also spoke of the "wooden formalisms of traditional tort and contract principles". It appears that the Court in Li and Daly and other recent decisions is attempting to achieve more fairness in loss spreading and compensation and less rigidity within the tort law system. With this frame of reference, the Daly case is more understandable.

Daly v. General Motors Corp. involved the death of a 36 year old male attorney as the result of injuries sustained when the Opel automobile decedent was driving collided with a metal highway divider fence causing the vehicle door to open and decedent being ejected from the vehicle.

The action was brought by decedent's widow and children based upon a theory of strict products liability arising from a defective product, i.e. an improperly designed door latch allegedly activated by impact.

Decedent: Kirk Daly -- 36 year old attorney

Parties: Plaintiffs -- Decedent widow and three surviving minor children

Defendants -- General Motors Corp., Boulevard Buick, Underwriter's Auto Leasing, Alco Leasing Co.

Facts:

(1) Early hours of 10/31/70

(2) Decedent southbound in Opel vehicle on Harbor Freeway in Los Angeles

(3) Speed 50-70 mph

(4) Collided with and damaged 50 feet of metal divider

(5) Impact--left side of vehicle with divider. Vehicle spun counter-clockwise. Decedent ejected and sustained fatal injuries.

(6) Evidence of decedent's alleged intoxication and failure to use safety devices in his vehicle was found by the Supreme Court to have been improperly admitted by the Trial Court.

In the trial court, the jury returned a verdict favoring all of the defendants. The plaintiffs appealed the judgment.

ISSUES ON APPEAL

The more important issues on appeal were:

1) Whether the principles of comparative negligence expressed by the Supreme Court in Li v. Yellow Cab Co., 13 Cal. 3rd 804 (1975) apply to actions founded on strict products liability?

2) Whether evidence of compensatory safety devices installed in a motor vehicle by its manufacturer is admissible to offset alleged design deficiencies?

3) Whether under the particular facts of this case, evidence of a driver's claimed intoxication or of his asserted failure to use his vehicle's safety equipment may be considered?

The Court determined that:

1) Comparative negligence principles apply to actions founded on strict liability.

2) Evidence of compensating design characteristics is admissible.

3) Under the circumstances of the case, prejudicial error occurred upon admission of evidence of decedent's alleged intoxication. (However, this is not to say that such evidence shall always be inadmissible since under proper statement of the law, the trier of fact can examine the plaintiff's conduct relative to the product.)

DISCUSSION

Plantiffs contended through an expert witness that the exposed pushbutton on the Opel door mechanism constituted a design defect and that other door latch designs afforded greater protection. Defendant's experts rendered opinions that the force of the impact would have caused the door to open even if the Opel were equipped with the door latch designs described by plaintiff's experts.

Defendants over plaintiffs' objections were allowed to introduce evidence that:

1) Use of either the Opel's door lock or seat belt/shoulder harness system would have prevented decedent's ejection.

2) Decedent didn't use either lock or seat belt/shoulder harness.

3) The Opel owner's manual contained warnings that the lock and seat belt/shoulder harness system should be used for accident security.

4) Decedent was intoxicated at the time of the collision (this evidence was admitted for limited purpose of determining whether Daly used the safety equipment).

Because decedent didn't use the safety equipment and the case was based upon defective product, the issue was raised as to whether comparative negligence be applied in a strict liability action.

The Court discussed the histories of strict liability and comparative negligence. For strict liability, the Court showed

how the necessary conditions precedent to stating a cause of action were gradually eroded as a result of "an historic combination of economic and sociological forces". Originally, there was required a connection between the injured user either by way of a contractual relationship, negligence concepts or breach of express or implied warranty and the manufacturer. Ultimately, however, California, in Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57 (1963), judicially established the doctrine of strict liability in tort. The court rejected the need for contract or express or implied warranty theories as a basis for liability and placed strict liability upon a manufacturer for putting into the market place a defective product.

"The liability was created judicially because of the economic and social need for the protection of consumers in an increasingly complex and mechanized society and because of the limitations in the negligence and warranty remedies . . ." (Daly, supra.)

The purpose of the Court was to insure that the costs of injuries from defective products are borne by the manufacturer that put such products on the market. Although contributory negligence was not a defense to actions founded upon strict liability, assumption of risk was. The manufacturer was liable for defective product design and manufacture beyond negligence, but not absolutely liable.

The Court then looked at strict liability within the principles enumerated in Li v. Yellow Cab Co., supra, i.e. comparative negligence. According to the majority opinion, the goals sought to be obtained would not be frustrated by the application of comparative negligence to strict products liability.

" . . . Plaintiff's recovery will be reduced only to the extent that his own lack of reasonable care contributed to his injury . . .". (Daly, supra.)

The Court stated that the fundamental and underlying purpose of Li was to promote the equitable allocation of loss among all parties legally responsible in proportion to their fault.

Another effect of the Li doctrine applied to strict products liability is that negligent assumption of risk, once a complete bar to recovery now reduces but does not bar plaintiff's recovery.

In response to objections that juries would be unable to assess plaintiff's negligence with defendant's strict liability, the Court looked to the federal experience under the maritime doctrine of "unseaworthiness". The doctrine is similar to strict liability and comparative principles have been applied to it. The Court determined that no practical problems had arisen.

The majority of other states, according to the Court, have applied comparative principles to strict products liability either by case law or statute.

The Court concluded:

> " . . . That a system of comparative fault should be and it is hereby extended to actions founded on strict products liability. In such cases the separate defense of 'assumption of risk', to the extent that it is a form of contributory negligence is abolished . . .".

The term "comparative fault" was adopted by the Court. This is probably a more accurate appellation than "comparative negligence" since negligence involves a duty to another and a breach of that duty, whereas comparative fault denotes loss apportionment.

The principles expressed in Daly v. General Motors Corp. are applicable to all cases in which trial has not begun before the date that the Court's decision becomes final. According to subdivision (a) of Rule 24 of the California Rules of Court, a decision of the Supreme Court becomes final 30 days after filing (unless shortened or extended by the Court). The opinion was filed March 11, 1978. Therefore, absent modification, the decision will become final April 15, 1978. Therefore, the principles enumerated do not apply to cases in which trial has been commenced prior to the date the decision becomes final. The principles, however, do apply to retrials. The Court also noted that the trial of the Daly matter occurred prior to the Supreme Court decisions in Li v. Yellow Cab Co., supra, and Horn v. General Motors Corp., 17 Cal. 3rd 359 (1976) and that the trial court did not have the benefit of those decisions. In the Horn opinion, the Court rejected the contention that non-use of safety equipment was "assumption of risk" or product "misuse", i.e. a defense to strict products liability.

Lastly, the Court as an aid to court and counsel in the event of retrial stated that in determining whether a product is defective, all of the equipment including safety features should be considered and the product looked at as a whole.

In addition to the majority opinion above discussed, there was a separate concurring opinion by Justice Clark, a concurring and dissenting opinion by Justice Jefferson, concurred in by Chief Justice Bird, and a dissenting opinion by Justice Mosk.

Justice Clark alluded to American Motorcycle Assn. v. Superior Court, 20 Cal. 3rd 578 (1978) and stated that there are difficulties in comparing fault. According to Justice Clark "it is not a problem that the allocation of fault cannot be precisely

measured -- rather, in most cases there is no measuring standard". Justice Clark recommends a . . . "uniform discount of the negligent plaintiff's recovery . . ." to bring about consistency and predictability.

Though Justice Jefferson's opinion is denominated "concurring and dissenting", it is essentially a dissenting opinion. The gist of the dissent is that it is impossible to compare elements or factors not subject to comparison, i.e. plaintiff's negligence with a defective product, and that juries will be unable to do that which judges cannot accomplish, i.e. a just result from an untenable premise.

Justice Mosk's dissenting opinion focuses on the evolution of strict products liability and the defective product placed in the stream of commerce. Citing among other cases Ault v. International Harvester Co., 13 Cal. 3rd 113 (1974), Justice Mosk states " . . . the focus is not on the conduct of the defendant, but on the nature of the product. That being so, the majority create an impossible dilemma for trial courts. If comparative negligence is to be applied, how can the trier of fact rationally weigh the conduct of the plaintiff against the defective product? . . ." The result will be to prejudice the plaintiff because of the unusual and impossible demand placed upon a jury. According to Justice Mosk, if negligence of the defendant in a strict products liability case is irrelevant, so, too, is the comparative negligence of the plaintiff (although Justice Mosk would retain assumption of risk as a bar to recovery). Justice Mosk believes the majority opinion is a regression in the doctrine of strict products liability. The effect will be to the detriment of consumers victimized by defective products.

CONCLUSION

The generalized effect of the majority opinion is both to give and to take away. Prior to this decision, contributory negligence was not a factor in a strict products liability case, but assumption of risk was. Now, although assumption of risk is no longer a bar to recovery, plaintiff's comparative fault (negligence?) may be considered in strict products liability cases.

As an aside, there is some discussion of the case being an anomaly since justices Tobriner and Manuel (allegedly liberals) joined with justices Richardson and Clark (allegedly conservatives). Given the reasoning of the majority and its relation to Li v. Yellow Cab Co., 13 Cal. 3rd 804 (1975), it seems that such a comment is not relevant to an analysis of the decision. The Daly holding appears to be consistent with the judicial intent as expressed in Li. The Court appears to be attempting to get away from labels and instead look at a method of loss apportionment based upon responsibility for the loss.

Brief of Jaramillo v. State of California
(1978) _____ Cal. App. 3d _____

FACTS:

Plaintiff sues for personal injuries arising out of an auto accident in which plaintiff collided with an automobile driven by Jones, owned by McKeon Construction and maintained by the State of California. Prior to trial plaintiff settled with defendants Jones and McKeon for $350,000. He then proceeded to trial against defendant state. The jury found plaintiff's total damages were $500,000. It then apportioned responsibility finding plaintiff 33.3 percent at fault and that 66.7 percent of fault was due to Jones and the State. After deducting 33.3 percent from $500,000 the jury assessed damages of $333,500 against the State. From this award the trial court set off $350,000, the amount of the prior award. This was done pursuant to CCP §877. As a result, plaintiff recovered nothing.

ISSUE ON APPEAL:

Under the requirement of CCP §877 is the amount offset from an award for settlements with other tortfeasors an amount equal to the settling tortfeasors proportion of fault or is the amount of the actual consideration paid for the settlement.

HELD:

The amount of offset is the actual amount of consideration paid for the settlement.

RATIONALE:

1. CCP §877 specifically requires a judgment be reduced by the amount paid.

2. AMA concluded that a plaintiff's recovery from non-settling tortfeasors should be deminished only by the amount that the plaintiff has actually recovered in a good faith settlement rather than by an amount measured by the settling tortfeasor's proportionate responsibility for the injury (20 Cal. 3d 604).

3. A plaintiff may not recover in excess of the amount of damages which will fully compensate him for his injury (Civ. Code §3333).

COMMENTS:

From a policy standpoint, the finality of settlements is fostered by reducing the award from the actual amount settled rather than from a later finding of proportionate fault. Plaintiffs are thereby encouraged to settle.

However where, as here, a plaintiff receives more than that to which he was entitled does he have to disgorge it under CC §3333. If, then, the settling defendant pays less than his proportionate fault, is it fair to require co-defendants to bear their burden or, just as he was allowed to keep too much, shouldn't plaintiff also bear the loss.

Although I feel that the policy favoring settlements outweighs the policy of allocation of liability according to responsibility, another policy decision as to whether plaintiffs or defendants should bear the inequitable apportionment engendered by settlements.

In view of my personal assumption that ours is a compensatory system rather than one based on blameworthiness, I predict plaintiffs will get the profits from settlements while defendants will make up the losses.

BRIEF OF:

Jess v. Hermann (1978) 79 CA 3d 140 (2d Dist., Potter)

ISSUE:

Does the mandate of Code of Civil Procedure §§ 431.70 and 666 apply to cases tried under pure comparative negligence?

HOLDING:

Yes. Judicial adoption of the rule of pure comparative negligence did not justify a judicial amendment of the statute so as to exempt cases involving comparative negligence from their operation.

FACTS:

Action for personal injury arising out of an automobile accident. At trial the jury found plaintiff's damages on the complaint to be $100,000. Defendant's damages on the cross-complaint were $14,000. Plaintiff was determined to be 40% responsible; defendant 60%. Thus, plaintiff's assessed damages were $60,000 and defendant's $5,600.

The trial court offset the two awards and rendered judgment for plaintiff in the sum of $54,400.

Section 666 clearly provides that a cross-complaint offsets a claim asserted in the complaint which in turn offsets the cross-complaint so as to result in a judgment only for the excess.

RATIONALE:

1. Setoff is legislatively mandated and it would be "judicial fiat" to mandate the opposite.

2. Setoff involves "serious issues of policy respecting the degree to which loss shifting from the injured party to society in general is justified."

5/8/78

ANALYSIS OF LI v. YELLOW CAB COMPANY, 13 C.3d 804 (1975)

Plaintiff: Nga Li

Defendants: 1. Robert Phillips, employee of Yellow Cab Company
2. Yellow Cab Company of California

General Issue Before the Court:

The question before the Court is whether the Court should judicially declare no longer applicable the Doctrine of Contributory Negligence which bars all recovery when a plaintiff's negligent conduct has contributed as a legal cause in any degree to the harm suffered by him and hold that it must give way to a system of comparative negligence which assesses liability in direct proportion to fault?

Proceeding in Trial Court:

Plaintiff Li brought an action for personal injuries and property damage against Yellow Cab Company. The trial court found that both plaintiff and defendant's driver were negligent and that such negligence was a proximate cause of the collision; therefore, plaintiff was barred from recovery by contributory negligence. A judgment was entered for the defendants. The plaintiff appealed such judgment. The question before the Supreme Court was the issue as stated above, i.e. whether or not contributory negligence should be abolished and in its stead a doctrine of comparative negligence established.

Facts:

1. Date and Time: November 21, 1968, 9:00 p.m.

2. Location: the intersection of Third Street and Alvarado Street in the City of Los Angeles. Third Street is an east and west street. Alvarado Street is a north and south street. Third Street is along the crest of a hill with Alvarado Street being the down side of the hill on the other side of Third Street. Alvarado Street is at least a six lane street, i.e. three northbound and three southbound lanes.

3. Plaintiff Li was northbound in the lane next to the center line and was intending to turn left across the southbound lanes of Alvarado into a gas station located on the southwest corner of the intersection. The driveway of the gas station is approximately seventy feet south of the center of Third Street. Defendant driver Phillips was southbound in the center lane of the three southbound lanes of Alvarado at approximately 30 miles per hour. According to the findings of the Court, Phillips entered the intersection on a yellow light. Plaintiff Li made a left turn in front of Phillips and Phillips' taxicab struck the right rear of plaintiff Li's automobile.

Conclusions of the Court:

The Supreme Court concluded:

1. The Doctrine of Comparative Negligence is preferable to the all or nothing Doctrine of Contributory Negligence from the point of view of logic, practical experience, and fundamental justice;

2. Judicial action in this area is not precluded by the presence of Section 1714 of the Civil Code, which has been said to codify the all or nothing rule and to render it immune from attack in the courts, except on constitutional grounds;

3. Given the possibility of judicial action, certain practical difficulties attendant on the adoption of comparative negligence should not dissuade us from charting any course leaving the resolution of some of these problems to future judicial or legislative action;

4. The Doctrine of Comparative Negligence should be applied in this State in its so-called "pure" form under which the assessment of liability in proportion to fault proceeds in spite of the fact that the plaintiff is equally at fault as or more at fault than the defendant;

5. This new rule should be given limited retrospective application.

Discussion:

The trial court had made findings that the defendant Phillips' speed at the time and place was unsafe and also found that plaintiff's left turn across the southbound lanes of Alvarado was made at a time when a vehicle was approaching from the opposite direction so close as to constitute an immediate hazard. The Court concluded that the driving of plaintiff was negligent and that such negligence was a proximate cause of the collision and plaintiff was barred from recovery by reason of contributory negligence.

The Court started out by defining contributory negligence as "conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm." (Li v. Yellow Cab Co., supra p. 809). The rationale for the contributory negligence rule is that one should not recover from another for damages brought upon oneself. The rule has been criticized for its harshness of operation but was not changed legislatively or judicially to this point. The harshness arose from the all or nothing effect of the rule. The court found that

it should be superseded by a rule which assesses liability in proportion to fault. Although the court pointed out that in a matter of practical experience juries often allow recovery in contributory negligence cases except that they diminish the damages because of the plaintiff's fault. In spite of this, the Court felt that to rely on that process, i.e. modification by the jury, was haphazard at best. In one of the footnotes of the opinion, the Court cites Prosser on comparative negligence. In that footnote there is a quote from Prosser which discusses the true explanation for the contributory negligence rule, at least according to Prosser: "Probably the true explanation lies merely in the highly individualistic attitude of the common law of the early 19th century. The period of development of contributory negligence was that of industrial revolution, and there is reason to think that the courts found in this defense, along with concepts of duty and proximate cause, a convenient instrument of control over the jury, by which the liabilities of rapidly growing industry were curbed and kept within bounds." After a discussion of the rationale behind the rule, the Court said on page 812 of the opinion, "It is manifest that this state of affairs, viewed from the standpoint of the health and vitality of the legal process, can only detract from public confidence in the ability of law and legal institutions to assign liability on a just and consistent basis."

Based upon its study, the Court concluded that the contributory negligence doctrine should be replaced by a comparative negligence doctrine. Defendants, however, contended that the Court was precluded from establishing comparative negligence judicially because this was a matter for legislative action. The Court in discussing the contention stated that "it was not the intention of the Legislature in enacting Section 1714 of the Civil Code, as well as other sections of that Code declarative of the common law, to insulate the matters therein expressed from further judicial development; rather, it was the intention of the Legislature to announce and formulate existing common law principles and definitions for purposes of orderly and concise presentation with the distinct view toward continuing judicial evolution." (Li, supra p. 814). The Court obviously concluded that it could modify the contributory negligence rule by judicial decision.

The Court was also faced with the language of Civil Code Section 1714 which is quoted on page 816 of the opinion: "Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully by want of ordinary care, brought the injury upon himself." By this, of course, as the Court points out, the reader is immediately struck by the fact that it seems to provide in specific terms for a rule of comparative negligence. The Court was looking specifically at the language "except so far as." The Court, however, says that the argument cannot withstand scrutiny and points out that

the statutes do not deal with defenses to negligence but rather the basic concept of negligence. The Court concluded that "it is in our view a manifest that neither the Legislature nor the code commissioners harbored any such intention--and that the use of the words 'except so far as' in Section 1714 manifest an intention other than that of declaring comparative negligence as the law of California in 1872." The words, according to the Court, were added to the statute to insure that the rule of contributory negligence as applied in California would not be the harsh rule applied in New York, but would be mitigated by the doctrine of last clear chance.

The conclusion that the Court reached relative to Section 1714 of the Civil Code was that it "was to state the basic rule of negligence together with the defense of contributory negligence modified by the emerging doctrine of last clear chance." (Li, supra p. 821). The question before the Court was whether the Legislature intended to restrict the courts from further development according to standards of duty, causation and liability. The Court, quoting Prof. Arvo Van Alstyne, alluded to the Code being incomplete and that this incompleteness allowed for judicial evolution.

The next argument that the Court addressed was that dealing with comparative negligence applied to multiple parties. The Court anticipated problems arising from contribution and indemnity among joint tortfeasors. The Court did not resolve the problem of contribution.

The second problem faced by the Court was the actual process of fault-finding. The Court recognized that the jury would be tempted to resort to a quotient verdict. However, the Court found that the difficulties were not insurmountable.

The third area that the Court discussed was the effect of the adoption of the comparative negligence rule upon the doctrines of last clear chance and assumption of risk. For last clear chance, the Court felt that the need for the doctrine disappears because its retention will result only in the windfall to the plaintiff under circumstances that are directly contrary to the concept of liability in proportion to fault. For assumption of risk, the Court divided the concept into two categories: 1) Where a plaintiff unreasonably undertakes to encounter a specific known risk "by defendant's negligence." This is in reality a form of contributory negligence. The other is where plaintiff agrees to relieve defendant of an obligation of reasonable conduct toward him. This is not contributory negligence, but rather a reduction of defendant's duty of care. Therefore, the Court determined that with the adoption of comparative negligence the defense of assumption of risk in the sense of it being a contributory negligence is merged into the comparative negligence principle of liability in proportion to fault.

The last problem considered by the court was the application of comparative fault to a situation involving willfulness conduct. This would be probably the gross negligence willful and wanton. The willful and wanton misconduct should not be diminished by comparative negligence, at least this is the initial thought. However, the court said that willful and wanton is in reality a degree of negligence, therefore the court felt there was no reason why comparative negligence principles should not be applied to willful and wanton misconduct. However, comparative negligence would not be applied to intentional conduct. The court concluded that "as we have indicated, on last clear chance and assumption of risk (insofar as the latter doctrine is but a variant of contributory negligence) are to be subsumed under the general process of assessing liability in proportion to fault, and the matter of jury supervision we leave for the moment within the broad discretion of the trial courts." (Li v. Yellow Cab Co., supra p. 826).

The court went on to discuss the precise form of comparative negligence which it was going to adopt. The two forms consist of the pure form and what is referred to as the 50% form. The pure form of comparative negligence apportions liability in direct proportion to fault in all cases. The second form, or the 50% form, applies to apportionment based upon fault up to the point at which the plaintiff's negligence is equal to or greater than that of the defendant. The court concluded that the pure form of comparative negligence should be adopted in California.

The conclusion of the court was:

> "For all of the foregoing reasons, we conclude that the 'all or nothing' rule of contributory negligence as it presently exists in this state should be and is herewith superseded by a system of 'pure' comparative negligence, the fundamental purpose of which shall be to assign responsibility and liability for damage in direct proportion to the amount of negligence of each of the parties. Therefore, in all actions for negligence resulting in injury to person or property, the contributory negligence of the person injured in person or property shall not bar recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the person recovering. The doctrine of last clear chance is abolished and the defense of assumption of risk is also abolished to the extent that it is merely a variant of the former doctrine of contributory negligence; both of these are to be subsumed under the general process of assessing liability in proportion to negligence." (Li v. Yellow Cab, supra pp. 828, 829).

The court then made the opinion retroactive to all cases in which trial had not begun before the date that the Supreme Court decision became final. Justice Wright, Tobriner and Burke concurred in the opinion by Justice Sullivan. Justice Mosk concurred but wrote a separate concurring opinion. Justice Mosk agreed with the result, but felt that the combination of limited retroactivity and applying it to the parties of the incident case was inconsistent with prior holdings of the court insofar as prospectivity and retroactivity of decisions was concerned. Justice Clark with Justice McComb concurring dissented in the opinion. Justice Clark argued against the concept that the court could change the law in light of the stated intent of Civil Code Section 1714. Justice Clark believes that the decision amounted to the amending of a statute, namely 1714 and that this power is vested solely in the Legislature.

78-599

PRODUCT LIABILITY

PRODUCT LIABILITY

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INTRODUCTION

The purpose of the law of torts in society "is to play an important regulatory role in the adjustment of losses and the eventual allocation of their cost."[1] It is the manner in which these losses are to be distributed together with ramifications which is the objective of the Joint Committee's activities as authorized by the California Legislature.[2]

Implicit within the framework of this report is a conscious concern for the interests and rights of both the consumer and the manufacturer. In approaching the task of implementing reform within the product liability system, the Legislature should give primary concern to the practical effects of product liability legislation on the individual and the manufacturer according to their reasonable expectations, rather than political expediency.

I

PRODUCT LIABILITY

A. The Problem. Manufacturers and other suppliers of products are experiencing enormous increases in the cost of product liability insurance. The Insurance Services Office (herein ISO),[3]

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[1]Fleming, J., "An Introduction to the Law of Torts," p. 1, (1967).

[2]ACR 170, Sept. 13, 1976. (Committee extension granted by ACR 2, Sept. 20, 1977).

[3]Hereinafter cited as ISO. The ISO gathers statistical data from reported nationwide claims experiences and, based on this data, suggests rates to subscribing members. Data gathered by the ISO is generally reflective of the product liability insurance field as a whole.

the primary product liability insurance rate-setting organization, increased manual rates[4] in 1975-76 an average of 83 percent which resulted in some product classes experiencing premium increases of over 660 percent.[5]

A sampling of letters received by the Committee from concerned individuals confirms the fact that high product liability insurance rates have become a reality for manufacturers. A letter from a high technology company that manufactures lasers for medical purposes states:

> ". . . to remain in the medical products market, it will cost over $200,000 in product liability insurance, up from less than $10,000 two years ago. This means that nearly five percent of the domestic medical laser revenues are for product liability insurance." (Letter from Coherent Radiation dated 2/9/77, on file with Committee.)

A letter from a manufacturer of trailers for diesel trucks complains:

> "Without any prior notification, we were advised by our insurance agent that our products premium had been invoiced at an unbelieveable 950% increase . . . the dollar premium increasing from $1800 annually. This increase pertained to the products portion of our policy only; the liability portion being over and above this figure as a separate item." (Letter from Tuff Boy, Inc. to the California Department of Insurance dated 10/8/76, on file with the Committee.)

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[4]Manual rates are one of several methods to set premiums and account for 66 percent of the product classes which represent 10 percent of premiums. (See Exhibit A).

[5]"Interagency Task Force Report on Product Liability Insurance Study," Vol. 1, p. ES-4, Department of Commerce (1977), hereinafter cited as ITFR.

Numerous independent organizations have conducted surveys which unanimously report escalating product liability insurance premiums are not isolated to a few categories of manufacturers, but are widespread throughout the industry and present formidable problems to manufacturers.[6]

B. Manifestations of the Problem. The word "crisis" is a label popularly used to describe the status of product liability in the wake of recent liability insurance rate increases. Whether this term accurately depicts the situation is a matter of considerable debate. However, it is clear the rising cost of product liability insurance has created economic problems to some manufacturers.

1. Insurance Costs As A Percentage of Profits. One indicator of the economic manifestations of insurance costs on manufacturers is the percentage such costs constitute of sales. The Interagency Task Force Report Insurance Study (herein ITFR) of eight target industries indicates insurance costs on the average constitute between one and two percent of sales for selected industries (supra at fn 5 at 3-7).

Evidence received by the Committee (on file in the Committee office) shows that for some small firms in California

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[6]Report of California Citizens Commission on Tort Reform, 1977; California Product Liability Task Force Report, 1977; Defense Research Institute, Products Liability Position Paper, 1976; Machinery and Allied Products Institute, Products Liability: A MAPI Survey, 1976; National Federation of Independent Business, NFIB Survey Report on Product Liability, 1977; The Woodworking Machinery Manufacturers, 1977.

the percentage of sales consumed by insurance expenses is in the range of five percent, with a few firms experiencing higher costs.

2. Affordability and Availability. As a consequence of escalating insurance premiums and the degree to which a manufacturer's financial resources are absorbed by the necessity to procure adequate liability protection, some manufacturers are finding the problem of high rates as one of availability because the cost is unaffordable.

In this context, the following caveat should be kept in mind. In many cases firms and insurance agents are reluctant to make public information regarding their status of insurance for fear of endangering their relationships with clients. Pinpointing what constitutes an availability problem is difficult because most manufacturers can secure some type of coverage if they are willing to accept a policy at a higher premium, agree to a larger deductible, or some other policy modification. While insurance costs have increased dramatically on a percentage basis, this fact does not always mean that prices are beyond the paying ability of a manufacturer. A premium increase of over 300 percent may be affordable if the previous premium was low in relation to the volume of sales.

With these qualifications, the ITFR concludes that while availability may present a problem to a minority of small businesses, overall there is no widespread problem of liability insurance availability (supra at fn 5, p. 3-4). The ITFR Insurance Study goes on to add:

> "Many small manufacturing firms are having trouble obtaining satisfactory coverage at a price they consider reasonable; however, after considerable effort, we have been able to identify by name only 62 firms that previously had coverage but are now going without it. Additionally, 110 unnamed firms were reported by trade associations. Thus, the availability of product liability insurance cannot at this time be fairly characterized as a severe problem, in our judgment. Certainly, the problem is not widespread." (Supra, fn 5 at 3-7. The only poll to show widespread unavailability was that of the National Machine Tool Builders Association. It found that 5 of 56 respondants were unable to procure product liability insurance at any price.)

Representatives of the insurance industry likewise confirm this view. Creighton White of Firemen's Fund testified:

> "As I perceive the product liability market today, the situation is more one of affordability of the coverage than of availability. There are ready sources of product liability insurance in California and across the country." (Transcript of Product Liability Hearing, Joint Committee on Tort Liability, July, 1977, p. 23.)

Evidence collected by the Committee indicates manufacturers in California are experiencing problems of affordability, with only a small portion of firms actually unable to obtain insurance at any price or reasonable policy modification. Rather, the general complaint made by manufacturers is that the high cost of insurance, if unabated, will limit the ability of manufacturers to obtain any reasonably priced product liability insurance.

C. The Source of the Problem. The reasons for the alleged "crisis" in product liability are complex. Conflicting allegations have been made by a variety of interest groups. For example, a recent news article stated:

> "More and more Americans are claiming injury from defective products in suits against manufacturers of everything from industrial machinery and drugs to power lawn mowers and sports equipment. While definitive figures are impossible to come by, the Commerce Department reports "an explosive increase in the number and severity of court claims and judgments on product liability . . . The repercussions of this steady escalation in claims, lawsuits and damage awards are already significant. Most seriously, perhaps, the cost of product liability insurance has been skyrocketing, and some insurance companies are even refusing to write such coverage." (Perham, J., "The Dilemma in Product Liability," Dunns Review, 1978.)

At the other end of the spectrum the following statement represents the opposing view:

> "The product liability situation is part of an overall claimed 'tort explosion' which has led to demands that all such cases be taken out of the court system, the rights to trial by jury be abolished and benefits to the injured severely restricted, yet none of the available statistics support such a claim." (Excerpt from prepared testimony of Wylie A. Aitken at Product Liability Hearing, July, 1977, p. 260.)

This section investigates the main allegations regarding the source of the "crisis."

1. Frequency of Claims. The "crisis" in product liability is of recent origin. Only over the past five years have insurance companies paid attention to the product liability insurance line. As a distinct line of insurance, product liability comprises a small volume of the total insurance business written by the insurance industry. Insurance underwriters have failed to maintain adequate loss experience records on the frequency and

severity of claims.[7] This situation has apparently been corrected due to increasing losses in the product liability line. However, most of the available data lacks historical background on claim trends.

As noted earlier, liability insurance premiums have escalated dramatically since 1975. Presumably the only other significant rate increase occurred in 1962 (supra, fn 5). It appears correct to assume, as does the ITFR Insurance Study, that constant rate levels between 1962 and 1975 reflect no tangible increase in the frequency and severity of product liability claims (Id.).

After 1972, the insurance industry took steps to correct previous deficiencies in product claim and loss data. The ISO reported that product liability claims decreased by 6 percent from 14,190 bodily injury (BI) claims in 1972 to 13,350 BI claims in 1974 (supra, fn 5). More recently, the ISO published an extensive Product Liability Closed Claim Survey (herein ISO Survey) which is an aggregate of 24,452 survey forms submitted by 23 participating companies for claims closed between July 1, 1976 and March 15, 1977.[8]

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[7]Testimony of Ken Holliday, Vice President of Sentry Insurance Company, at Product Liability Hearing, July, 1977, p. 15.

[8]The dates used by the Survey do not reflect the actual year of occurrence, but are in reality spread over a ten year span of occurrence. The one year period is used in order to characterize all claims as if they occurred and were closed within this time frame and representative of present cost levels.

The ISO Survey reports that for bodily injury (BI) parties, 12,524 claims were made with 8,331 closed with payment. For property damage (PD), 7,688 claims were filed with 5,211 closed with payment. California figures are fairly representative of the state's population in relation to U. S. population with 1,513 claims alleging BI, 1,032 of which were closed with payment. The number of claims reported for PD are 941 with 657 of those settled with payment. These figures are not disproportionate when compared to other states such as New York (1,004 claims with 700 paid) and Pennsylvania (813 claims with 537 paid).[9]

When compared to the figures compiled by the ISO for BI claims in 1972 and 1974, the number of claims for product related injuries has actually decreased.

2. Severity of Claims. Complementing the allegation of a rise in the number of claims is an assertion that the severity of claims is outstripping the ability of insurers to absorb such losses without corresponding increases in the price of liability insurance.[10]

Available historical information of claim severity is as limited as claim frequency data. For the years 1972-1974, the ISO Survey reports a 180 percent increase in the cost of the average settlement from $6,800 to $19,500 (supra, fn 5). However,

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[9]Insurance Services Office Product Liability Closed Claim Survey, Report 1 at 148; Report 2 at 149-152.

[10]Perham, J., "The Dilemma in Product Liability," Dunns Review, 1978.

the information contained in the ISO Survey on claim severity cannot be used without an explanation of what is referred to as "trend factor." The ISO Survey data are based on claims which reflect costs if all claims occurred and were settled in one year (1976-1977). In order to achieve this objective, a trend factor is calculated into the average payment to reproduce the increase in costs, medical expenses, inflation and other cost variables. The trend factors employed by the ISO Survey are 25 percent for BI and 15 percent for PD (supra, fn 9). As defined, the "trend factor" has been criticized as of limited value because it does not illustrate the actual dollars paid out.[11]

The ISO Survey adds the following precaution:

> "An occurrence year cannot be constructed by cost adjustment alone. It is possible that an incident from 1965 would not have occurred in 1976 due to changes in the legal environment, social attitudes, business expectation, government, et cetera." (Supra, fn 9).

Consequently, the occurrence year constructed by the ISO Survey may not provide a completely reliable picture of claim severity as it exists today.

The ISO Survey statistics show that when trended for severity, the average BI payment per claim is $13,911 and $3,798 for PD. The average BI payment per incident is $26,004 and $6,871 for PD. These figures represent a total of 14,074 out of 20,624 claims that were closed with payment. The total dollar payment for

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[11]Product Liability Insurance Report, Subcommittee on Capital, Investment and Business Opportunities, p. 34, 1978.

all BI was $221,686,199 and $35,805,727 for all PD (supra, fn 9 at 11 and 148).

The same statistics at the State of California level show the average BI payment as $12,519 for 1,032 claims, or a total of $12,919,887 (supra, fn 9 at 149). When compared to the ISO average per claim figures for the national experience from 1972 to 1976, there has been a substantial increase in the severity of claims paid out by insurance companies.

The statistics provided by the ISO lead to the conclusion that while the frequency of claims may be steadily decreasing, the severity of claims is escalating.

3. Significance of Claims That Resort to the Legal System. The data compiled by the ISO Survey includes claims pursued to resolution along various stages of litigation. The majority of claims are settled outside of litigation. Approximately 73 percent of BI claims and 83 percent of PD claims are settled without the filing of a lawsuit (supra, fn 9). Of the 12,135 BI claims reported, 28 were submitted to binding arbitration and 8,845 settled without suits being filed. Of a total of 7,429 PD claims, 40 claims went to arbitration and 6,132 were resolved without litigation (supra, fn 9).

However, as claims continue to progress in litigation, the transaction costs increase. The ISO Survey indicated for every claim dollar paid, insurers incurred an additional 35¢ per BI claim and 48¢ per PD claim in defense costs. The largest item of these additional costs, approximately 83 percent, is the attorney's fee (supra, fn 9).

The number of product liability claims resolved by a jury verdict demonstrates the public is increasingly likely to resort to the legal system for compensation, although estimates of product liability litigation are less than one percent of the total number of civil suits filed.[12] The national figure is estimated to be 50,000-60,000.[13]

Data specifically relating to product liability litigation in California are unavailable. However, the California Judicial Council (hereinafter Judicial Council) information on the volume of filings on an annual basis allows an estimation of the number of product liability suits. The Judicial Council's report does not isolate product liability litigation, but assuming trends in civil litigation reflect product liability experience, we may arrive at estimated amounts of filings. Filings are broken down into criminal or civil classifications. Civil filings are further broken down by subject matter into such categories as "Motor Vehicle Personal Injury" and "Other Personal Injury."

Filings reported at the Superior Court level for "Motor Vehicle Personal Injury" for 1976-1977 was 57,193, an 8 percent increase over the 1975-1976 total of 52,555. In the category of "Other Personal Injury" the total filings were 28,411

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[12]Excerpt from prepared testimony of Wylie A. Aitken, past president of California Trial Lawyers Association, at Product Liability Interim Hearing, July, 1977, p. 260.

[13]Publication by National Committee on State Legislatures, March 20, 1978.

and 27,755, or an increase of 2 percent.[14] The number of "Motor Vehicle Personal Injury" filings for 1976-1977 is 81 percent greater than 1967-1968 (Id.). The "Other Personal Injury" number of cases filed in 1976-1977 were double the number filed in 1967-1968 (Id. at 77). Some counties experienced a larger growth in filings. For example, Los Angeles County accounted for about 60 percent of the overall increase in personal injury filings (Id.). Other counties, such as Del Norte, El Dorado, Fresno, and San Francisco, reported a decrease in the number of personal injury filings (Id. at 140, Table 14, p. 141, Table 15).

With civil filings increasing at a steady rate, it would be expected the time expended disposing of litigation would also increase. The Judicial Council measures the elapsed time to trial in civil cases in months from the filing of the at-issue memorandum. Statistics gathered from twenty metropolitan courts show the average interval from at-issue memorandum to trial from June, 1976 to June, 1977 increased in many courts, with some increases being substantial. In only five of the twenty counties did the median jury case reach trial within a year. Some examples of other increases are: San Bernardino (up 16 months); Fresno (up 4.5 months); Marin and San Joaquin (up 4 months); Contra Costa, Los Angeles, Riverside and Santa Barbara (up 3 months). Three courts--Monterey, Sacramento and San Mateo--experienced a reduction in elapsed time to trial (Id. at 93).

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[14]Judicial Council Annual Report to the Governor and Legislature, Table 17, p. 79 (1978).

As anticipated, cases that continue to progress in the legal system consume the bulk of the court's time. Evidence for 1977 indicates the number of cases waiting to commence trial is up 14 percent (a total of 104,771, up 12,793 from 1976). This is the largest increase since the Judicial Council began compiling elapsed time records (Id. at 91). Interestingly, only a small percentage of the total cases awaiting trial are actually disposed of by a trial. As of June 30, 1976 only 25.6 percent of the civil cases pending trial were actually disposed of in a contested trial (Id.).

4. Jury Verdicts and Awards. An alternative method to measure product liability litigation in California is to analyze trends in the volume and dollar amounts of product liability jury verdicts. Although only a minority of cases result in a jury verdict, it is assumed that the number of cases resolved by jury verdict should also increase. Using the Jury Verdict Bi-Annual Index, the Committee conducted a survey of reported jury verdicts and awards from June, 1971 through July, 1978. (Prior to June, 1971 product liability verdicts were not separately classified.) Verdicts recorded in a single year are recorded and distributed according to dollar range.

The total number of product verdicts was 640. Of that number, 357 (55.8 percent) were in favor of defendants; 271 (42.3 percent) were for plaintiffs; 4 cases were non-suited and 8 cases were dismissed. The plaintiff verdict dollar range between

June, 1971 and July, 1978, by amounts, was 105 (37.7 percent) within the $0-24,999 range; 49 (17.5 percent) within the $25,000-49,999 range; 35 (12.5 percent) within the $50,000-99,999 range; 42 (15 percent) within the $100,000-249,999 range; and 48 (17 percent) within the $250,000 and above range. (See Exhibit B).

D. Conclusions. From the evidence presented above it is apparent that the cost of product liability insurance has increased substantially. As insurance costs continue to escalate, the problem of affordability will become more pronounced as manufacturers seek ways to cope with higher premiums. Inevitably, some firms, particularly small manufacturers, will be forced to take drastic steps in order to remain in business. The ITFR Insurance Study (supra, fn 5) concludes "as recent rate increases appear to represent a correction for past rate inadequacy, it seems unlikely that product liability rates will rise as sharply in the future as they have in the past two years." (Supra, fn 5). Assuming claims remain constant, representatives of the insurance industry believe rates will not continue to rise.

> "What we have seen in the last two or three years really is a catching up of rate levels. We were inadequately pricing it [liability insurance] in the past years, with the emergence of strict liability and the theory of entitlement, it brought claim activity up to a level. I'm not certain that it will continue to escalate as much in the next five years as it has . . . but it will continue to escalate as long as claims and [sizes] of claims escalate." (Supra, fn 7).

Evidence reveals that while claim severity is increasing, the frequency of claims is decreasing at a uniform pace. Further, while the number of civil suits filed may be

increasing in modest increments, defendants are winning a majority of cases.

From these facts it is logical to conclude the volume of litigation and claim severity does not justify the dramatic increase in the cost of liability insurance experienced by manufacturers. Certainly the situation of product liability cannot be called a "crisis." Insurance is available to manufacturers at some price and with some policy modification. Reported cases of manufacturers unable to obtain insurance constitutes a minority of all cases. While insurance costs are consuming a larger portion of the manufacturer's revenue dollar, the percentage remains small and thus far has not created any severe hardship.

II

DEVELOPMENT OF PRODUCT LIABILITY

A. Introduction. At the center of the alleged "crisis" in product liability is the perception that the development of the law has generated uncertainty regarding the manufacturer's potential liability and the availability of adequate defenses.[15]

With emphasis on strict liability, this section reviews theories of product liability from a historical perspective and attempts to isolate major issues.

B. Definition. Product liability has been defined as "the area of case law involving the liability of sellers [or other

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[15]"Righting the Liability Balance," Report of the California Citizens Commission on Tort Reform, September, 1977, p. 140.

suppliers] of chattels to third persons with whom they are not in privity."[16] Traditionally, liability for product-related injuries is imposed under theories of negligence, warranty, and more recently, strict liability in tort. The development of each cause of action has been neither uniform nor precise. This has been particularly true of strict liability.[17]

C. Negligence. As an outgrowth of nineteenth century attitudes toward unrestrained free enterprise, the courts refused to permit a plaintiff not in privity of contract with a manufacturer or other product supplier to recover for injuries resulting from a defective product (supra, fn 16 at 642). The rationale behind the privity requirement was that an "infinity of actions" would ensue by requiring manufacturers to defend against remote plaintiffs in the absence of a contractual relationship.[18] Subsequent case law mitigated the harsh effect of the privity rule by carving out numerous exceptions for products which were intrinsically dangerous to human life. The privity requirement was finally disposed of in MacPherson v. Buick, (1916) 217 N.Y. 382, 111 N.E. 1050. MacPherson held that regardless of whether the product is inherently or imminently dangerous to human life, if "the nature

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[16]Prosser, William L., Law of Torts, 4th Ed. (1971), p. 641. (Hereinafter cited as Prosser.)

[17]West, D., "A California Perspective on Strict Products Liability," 9 PLJ 775 (1978).

[18]Winterbottom v. Wright, (1842) 152 Eng. Rep. 402.

of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger" (Id.).

The overthrow of privity permitted liability to be imposed under common law elements of negligence. If he fails to use due care in its manufacture, a supplier of a product is liable "to any person who is foreseeably injured by the supplier's negligent conduct."[19]

In order to establish a cause of action in negligence, the plaintiff must show the manufacturer owed a duty to protect the plaintiff against unreasonable harm. The basis for this duty normally arises out of the relationship of the parties, the nature of the defendant's conduct, and the type of injury the plaintiff is likely to sustain.[20]

The defendant is required to act as a reasonably prudent person under the circumstances (supra, fn 16 at 644). This includes compliance with governmental safety regulations, reasonable inspections and testing, or otherwise taking such action to avoid subjecting the consumer to an unreasonable risk of harm (supra, fn 19 at 8). The plaintiff must also demonstrate that the defendant breached this duty which breach was the actual cause and proximate cause of the plaintiff's injuries (Id. at 194).

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[19]Noel, D., Philips, J., "Products Liability In A Nutshell," (1974), p. 4 (hereinafter cited as Products Nutshell).

[20]Fleming, J., "An Introduction to the Law of Torts," (1967), p. 44.

1. Defenses. In actions for negligence, the conduct of the plaintiff plays a critical role in the allocation of the loss. The manufacturer or supplier of the product is required only to design and manufacture a product that is reasonably safe for intended uses, and safe for some other uses which are reasonably foreseeable (supra, fn 16 at 645). A consumer who misuses a product in a completely unexpected or irrational manner and is subsequently injured may have no remedy.

Traditionally, conduct on the part of the plaintiff which contributed to his/her own injuries acted as a complete defense in negligence actions. This was also true in situations where the plaintiff assumed the risk by voluntarily and unreasonably encountering a known risk. These rules were judicially abrogated by the California Supreme Court in Li v. Yellow Cab Company[21] which held:

> "The 'all-or-nothing' rule of contributory negligence . . . is superseded by a system of "pure" comparative negligence . . . Therefore, in all actions for negligence . . . the contributory negligence of the person injured shall not bar recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the person recovering." (Id. at 829).

The Court retained one form of assumption of the risk as a defense, but abolished that form of assumption of the risk which was merely a variant of the former doctrine of contributory negligence (Id.).

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[21]Li v. Yellow Cab Company, (1975) 13 Cal. 3d 804, 532 P.2d 1126, 119 Cal. Rptr. 858.

D. Warranty. Actions involving warranties fall into two categories--express or implied. In turn, implied warranty is split into either a warranty of merchantability or a warranty of fitness for a particular purpose.

In a limited sense, liability established under a breach of warranty is strict liability. The seller of the goods is responsible for any representations, either express or implied, made to the buyer at the time of the sale regarding the quality or performance of the product.[22] A finding of a breach of any of the representations is not subject to any defenses and liability is absolute. The reason for imposing liability that is essentially strict in breach of warranty actions is outlined in the following policy statements.

Society has a strong interest in the protection of human life and accident prevention. The consumer is unable to protect against latent dangerous defects in products put on the market. Therefore, the manufacturer or supplier is assigned responsibility for "the harm they [products] cause, even though the supplier has done his [her] best (supra, fn 16 at 651).

By placing a product into the stream of commerce, the manufacturer, distributor or retailer impliedly represents the product is safe for use. In essence, "the supplier has invited and solicited the use; and when it leads to disaster, he [she] should not be permitted to avoid the responsibility by saying that he [she] has made no contract with the consumer (Id.).

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[22]Noel, D., "Manufacturers of Products--The Drift Toward Strict Liability," 24 Tenn. L.R. 982 (1957).

"Judicial economy" dictates that simple procedures be followed to resolve legal disputes. Rigid adherence to procedural rules would require a plaintiff to initiate a succession of actions against actors positioned in the chain of distribution. This result not only generates unnecessary litigation, but offends traditional notions of justice as well (Id.). Therefore, the number of potential defendants is limited by the nature of the cause of action.

1. Express Warranty. This type of action is the most elementary form of strict liability. Section 2-313 of the Uniform Commercial Code (herein UCC) sets out the elements of an express warranty. If the seller breaches an express representation, written or oral, to the buyer, and going to the basis of the bargain, liability is essentially strict regardless of the degree of care used by the seller.

2. Implied Warranty. Liability for breach of an implied warranty extends actionable representations from express assertions of fact to implied representations of merchantability (UCC 2-314) and fitness (UCC 2-315). Historical limitations on actions for breach of implied warranty were discarded in Henningsen v. Bloomfield Motors, (1960), 32 N.J. 358, 161 A.2d 69, which expanded the range of potential plaintiffs to include any reasonably foreseeable plaintiff and enlarged the class of actionable products to include commonly used goods. The majority based its holding on the policy that:

> ". . . the burden of losses consequent upon use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur . . . Accordingly, we hold that under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser. Absence of agency between the manufacturer and the dealer who makes the ultimate sale is immaterial." (Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69, at 84).

In the wake of Henningsen, a majority of states rapidly expanded the strict liability aspect of implied warranty to a wide range of products (supra, fn 16 at 655).

3. Reliance, Notice and Disclaimer. Actions founded on a breach of warranty presented a number of procedural obstacles to consumers.

In some instances the consumer must establish that he/she relied on the seller's representation which formed the "basis of the bargain." Whether "basis of the bargain" can be equated to mean reliance is presumed is unclear. However, the UCC (2-213, Comment 3) has apparently eliminated reliance as a required element to actions for breach of warranty.

Section 2-607 of the UCC requires the buyer to give notice of the breach to the seller within a reasonable time after the breach occurs, in order to protect the seller from stale claims. This section may also have the unfortunate effect of acting as a "booby-trap for the unwary" (supra, fn 16 at 655). Few consumers are knowledgeable of the business practice which justifies the notice rule. The "reasonable" time period has

usually lapsed long after an injured plaintiff learns of the notice requirement. The harsh effects of this rule have lead the courts to liberally interpret the "reasonable" notice period to achieve substantial fairness. The UCC further provides a seller may limit its liability through disclaimers under Section 2-316. Disclaimers may work well in a setting where a buyer is willing to waive specific legal rights in exchange for a bargain item. Also, the seller may have no knowledge of the chain of consumers the product will pass through or how the product will be treated.

This rationale may operate fairly in a commercial setting. However, the policy goals of product liability are clearly frustrated when a consumer who buys at retail is bound by a disclaimer he/she has never seen or agreed to. Disclaimers added to the product may be excessive in scope and unfair to the consumer who has relied on the safety of the product. Consequently, disclaimers are strictly construed if the parties are in an unequal bargaining position. Disclaimers have been found inapplicable in actions to recover for personal injuries.[23]

E. Strict Liability In Tort. The problems inherent in establishing a legal claim under theories of negligence or warranty provide a strong impetus for adopting strict liability in tort for products. In Greenman v. Yuba Power Products, Inc.,[24] the

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[23]Smith, J., "Disclaimers of Warranty," 12 Hast. L.J. 152, (1960); DeChaine, "Product Liability and the Disclaimer," 4 William and Mary L.R. 364 (1967).

[24]Greenman v. Yuba Power Products, Inc., (1976) 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 397.

California Supreme Court, lead by Justice Traynor, introduced strict liability as an alternative to negligence or warranty actions.

In Greenman (supra) a plaintiff was injured while working on a piece of wood with a combination power tool and wood lathe. The wood dislodged from the tool and flew out, striking plaintiff in the head. In plaintiff's subsequent action to recover for personal injuries, defendant manufacturer claimed Greenman's wife was the original purchaser of the power tool and there was no privity (contractual relationship) between the defendant and Greenman and, in addition, timely notice of the breach was not given as required by the Uniform Sales Act.[25]

To avoid difficulties presented by the privity and notice defenses, Justice Traynor characterized the cause of action as one of arising through the operation of tort law and not under the restrictions of contract. Liability was simply strict based on the policy underlying product liability. In this situation, a cause of action in warranty would not successfully protect the safety of future consumers through deterring the manufacturer of a defective product, nor would it provide compensation to an injured user.

On this basis, warranty concepts were discarded and strict liability adopted by the court, which stated:

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[25]At the time of the accident, California followed the Uniform Sales Act which was superseded by the UCC.

> "Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law . . . and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products . . . make clear that the liability is not one governed by the law of contract warranties, but by the law of strict liability in tort. Accordingly, rules defining the governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by its defective products unless those rules also serve the purposes for which such liability is imposed." (Supra, fn 24 at 63.)

In order to recover, the plaintiff was only required to show that he was injured while using the tool in a way it was intended to be used and as a result of a latent defect in design the tool was unsafe for its intended use (Id. at 64).

The Court stated the applicable rule:

> "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being . . ." (Id. at 68).

Standing behind the rule was the recognition that alternative remedies failed to adequately protect the helpless consumer. Frequently, the plaintiff was unable to show negligent conduct on the part of the manufacturer or satisfy the conditions imposed by warranty. The manufacturer is also in a better position to anticipate future losses and can spread the loss through liability insurance. The extra cost incurred through imposition of liability

that is strict can be viewed as a cost of doing business which is distributed to the consumer through higher prices. In this manner, manufacturers are deterred from marketing defective products which indiscriminately injure consumers unable to absorb the loss.

III

ELEMENTS TO AN ACTION IN STRICT PRODUCT LIABILITY

A. Parties. The class of potential plaintiffs extends to any foreseeable lawful user of a product (supra, fn 16 at 633), including the innocent bystander.[26] The only limitation is the plaintiff not be engaged in the retail sale, distribution or manufacture of the injury-producing product (supra, fn 17 at 790). Proper defendants include manufacturers, distributors, retailers, component-part manufacturers, or almost any seller of a product (supra, fn 16 at 633), regardless of whether the defendant is in privity with the plaintiff.

B. Product Defect. The plaintiff must also prove the product was defective through a mistake in design, error in manufacture, or through inadequate warnings or instructions (supra, fn 19 at 115). The one aspect of strict liability which has proven most troublesome to the courts in California is the definition of "defect."

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[26]Elmore v. American Motors Corp., (1969) 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652.

1. Design. The only guidelines provided by the Greenman opinion on product defect was the statement that a product must possess a "defect of which the plaintiff was not aware and which made [the product] unsafe for its intended use" (supra, fn 24).

Later, the American Law Institute published the Restatement of Torts (Second), Section 402A, which called for imposition of strict liability on the seller of "any product in a defective condition unreasonably dangerous to the user or consumer." Comment (i) to Section 402A elaborated on the term "unreasonably dangerous" stating:

> "The article sold must be dangerous to an extent beyond which would be contemplated by the reasonable consumer who purchased it, with the ordinary knowledge common to the community and its conditions." (Restatement of Torts (Second), Section 402A, Comment i).

Apparently, this definition was intended to impose liability for only those goods which present an unreasonable danger to the consumer and not for products such as "good butter . . . because . . . it deposits cholesterol in the arteries and leads to heart attacks."[27]

Surprisingly, the inconsistency between the Greenman (supra) definition of "defect" and the Restatement (supra) definition of "unreasonably dangerous" limitation on defect generated little dissent within the legal community which employed the two

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[27]Prosser, William L., "Strict Liability to the Consumer in California," 18 Hast. L.J. 9, 23 (1966).

terms interchangeably.[28]

The discrepancy between the Restatement and Greenman was finally addressed in Cronin v. J.B.E. Olson Corporation.[29] The Court first rejected the Restatement definition of defect while simultaneously disposing of the "intended use" concept enunciated in Greenman.

The Court noted that defining defect through an "intended use" criterion permits recovery only if the product is more dangerous than contemplated by the consumer. The "intended use" formula fails to consider uses well within the contemplation of the consumer which may pose a serious risk of harm. To eliminate this result, the Court substituted the imposition of liability whenever the product's use is "reasonably foreseeable", regardless of whether the use is unintended or improper. Arguably, the manufacturer must design his/her product in such a manner so as to contemplate a certain amount of misuse. More significantly, the Court also rejected the instructions to the jury which incorporated the Restatement's "unreasonably dangerous" requirement for defect.

The Court reasoned that the "unreasonably dangerous" standard would require the plaintiff to satisfy a two step criterion: 1) that the product was defective, and 2) the defect was unreasonably dangerous to the consumer. This result conflicts

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[28]Traynor, "The Ways and Means of Defective Products and Strict Liability," 32 Tenn. L.R. 363 (1963).

[29]Cronin v. J.B.E. Olson Corp., (1972) 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433.

with the policy of Greenman designed to alleviate the plaintiff's burden of proof rather than increase it. Liability can be equitably allocated under the Greenman version of defect without resorting to a two step test that "rings of negligence" or has a "negligent complexion."

Despite the Court's reprimand of the Restatement defect standard, the Cronin opinion failed to give a more precise definition of design defect. All that could be said was that a plaintiff, in order to prove a design defect, must now show a reasonable design alternative that offers greater safety and is economically feasible.[30]

In recognition of Cronin, the BAJI Committee dropped the "unreasonably dangerous" language in BAJI Instruction 9.00 and criticized the Court's opinion by stating:

> "Unfortunately, the Court eschewed the opportunity to define either defect or defective condition within the strict liability rule. With no decisional or statutory guidance, the Committee is without definitive precedent by which to define either defect or defective condition." (BAJI Instruction 9.00, Comment, Supp. to 6th Ed., 1977).

The Supreme Court again faced the defect issue in Barker v. Lull Engineering Company.[31] Barker involved a plaintiff who was injured while operating a lift loader on a steep construc-

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[30]Schwartz, G., "Barker v. Lull, The Definition of Defect in Product Liability Design Cases," Report to the Joint Committee on Tort Liability, p. 5 (1978). Hereinafter cited as Schwartz.

[31]Barker v. Lull Engineering Co., (1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443.

tion site. In support of his allegation that the loader was defective in design, plaintiff presented expert testimony relating to the instability of the loader because of its narrow base. The expert witness further testified that outriggers would eliminate its tendency to roll over and that a roll bar and seat belts would have protected plaintiff from injury. Plaintiff appealed the defense verdict on the ground the trial court committed prejudicial error in instructing the jury that "strict liability for a defect in design . . . is based on a finding that the product was unreasonably dangerous for its intended use" (Id.).

The gist of the plaintiff's appeal was the court's opinion in Cronin (supra) which rejected the "unreasonably dangerous" defect requirement in strict product liability cases. Defendant argued that Cronin involved a manufacturing, as opposed to a design defect, and the language in Cronin eliminating the "unreasonably dangerous" requirement in a design case did not apply to manufacturing defects.

Taking note of the Restatement view of defect, the Court reiterated arguments originally used in Cronin to reject the "unreasonably dangerous" terminology, and reaffirmed strict liability in tort as set forth in Greenman:

> ". . . that a plaintiff satisfied his burden of proof under Greenman in both a 'manufacturing defect' and 'design defect' context, when he proves the existence of a 'defect' and that such defect was a proximate cause of his injuries." (Barker, supra fn 31 at 428).

The Barker opinion goes on to state the variety of deficiencies that may constitute a defect in a particular product

precludes the formulation of any hard-and-fast definition as to the meaning of "defect" applicable to all product cases. This issue is "best resolved by resorting to the 'cluster of useful precedents' which have been developed in the product liability field in the past decade and a half" (supra, fn 31). These precedents illustrate the "great variety of injury-producing deficiencies" (Id.) which may act as guides to trial courts to assist in formulating proper instructions regarding the defect issue.[32]

In Barker the Court adopted a two-prong test to be applied to determine design defect. First, the product is defective in design if the plaintiff proves that the product failed to perform as safely as an ordinary consumer could expect when the product is used in an intended or reasonably foreseeable manner. Under this standard, the burden of proof is on the plaintiff and the defendant's liability extends not only to intended uses but to reasonably foreseeable uses as well.

Where the product does meet the expectations of the consumer, but an injury still results from its use, the plaintiff will not be denied compensation if elements of the second part of the test can be satisfied. Under the second prong, the product

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[32]Id. at 429, citing: Escola v. Coca Cola Bottling Co., (1944) 24 Cal. 2d 453, 150 P.2d 436; Rice v. Frank G. Hough Co., (1970) 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629; Midgley v. S. S. Kresge Co., (1976) 55 Cal. App. 3d 67, 127 Cal. Rptr. 217.

is defective if "the risk of danger inherent in the product's design is not outweighed by the benefits associated with that design" (supra, fn 30 at 11). The risk-benefit test permits the jury to consider all the relevant factors involved in the product design in defining a defect. Therefore, when plaintiff makes a prima facie showing that the injury was proximately caused by the product's design, "the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective" (supra, fn 31 at 431).

Shifting the burden of proof to the defendant, the Court explained public policy requires "a manufacturer who seeks to escape liability for an injury proximately caused by its product should on a risk-benefit theory bear the burden of persuading the trier of fact that its product should not be judged defective" (Id.). The Court concludes by pointing out these dual tests are mutually independent and may be modified in relation to the factual setting.

2. Manufacture. A defect in the manufacture of a product differs from a defect in design in that the former relates to an error or mistake in production of an individual item even though the design was entirely adequate (supra, fn 19 at 140). The distinction between a defect in design or manufacture has generally not been a problem with the courts. In Barker, the Court stated:

> "A plaintiff satisfies his burden of proof under Greenman in both a 'manufacturing defect' and 'design defect' context when he proves the existence of a 'defect' and that such a defect was the proximate cause of his injuries." (Supra, fn 31 at 427, citing Cronin).

What specifically constitutes a manufacturing defect is to be determined from the "cluster of useful precedents" rather than any hard and fast rule.

3. Defect Arising Out of Inadequate Warnings or Instructions. The third type of defect considered under strict liability principles is the duty to give adequate directions for use or warnings (supra, fn 19 at 162). Generally, the warning or directions must be adequate to protect against a foreseeable use (or misuse), the sufficiency of which may be determined in light of prior case law.[33]

C. Causation. The element of causation in strict product liability is similar to the basic causation theories in negligence. The plaintiff must not only prove a defect existed in the product, but also the defect was the proximate cause of plaintiff's injuries (supra, fn 29 at 133-134). The proximate cause element is limited in scope to plaintiff's harm that was "reasonably foreseeable." The "reasonably foreseeable" standard has been criticized as contrary to the principles of strict liability in as much as the quantum of evidence necessary to satisfy the causation

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[33]In Barker the Court refers to Midgley v. S. S. Kresge, supra fn 32, wherein a young boy sustained optical injuries from a telescope that contained inadequate instructions for assembling a "sun filter" attachment.

element is not precise. Is the plaintiff required to prove what the manufacturer or distributor should foresee? If so, this standard increases the plaintiff's evidentiary burden, a result directly contrary to the purposes of strict liability (supra, fn 17 at 793). On the other hand, the "reasonably foreseeable" limitation on proximate cause is designed to protect defendants from liability for all harms that result for their allegedly tortious conduct (supra, fn 19 at 198).

D. Injury. The plaintiff must also show the defect in the product resulted in actual injury to plaintiff. The social responsibility aspect of product liability dictates that parties injured by a defective product be adequately compensated for losses arising from the injury. Allowable damages include compensation for personal injury, property damage and wrongful death (supra, fn 16 at 666). Damages for pecuniary or economic losses, i.e. business losses, etc., alone are not recoverable under strict product liability actions.[34] The limitation on such economic loss is to preclude manufacturers from being responsible for speculative damages if the lost value of the bargain is calculated into plaintiff's recoverable damages.

The assessment of punitive damages in strict liability cases is an open question. In theory, strict product liability should not recognize concepts of fault. Liability is imposed based on

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[34]Seely v. White Motor Co., (1965) 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17.

the performance of the product and not the conduct of the parties. Logically, then, punitive damages which are designed to punish culpable conduct have no place in strict product liability. However, an important aspect of strict liability is the policy of deterring the manufacture of defective products. This goal can only be accomplished by substantial economic penalties which compel a manufacturer to discontinue tortious conduct. Such damages are properly assessed in products cases.

While punitive damage awards may be in theoretical conflict with the doctrine of strict liability, they have nevertheless found their way into product liability litigation.[35]

E. Defenses. The adoption of the doctrine of comparative negligence by the California Supreme Court in Li v. Yellow Cab Co. (supra, fn 21) raised the issue of whether comparative negligence of the plaintiff should be allowed as a defense in strict product liability cases. The Court has, until recently, refused to confront the issue, preferring to narrowly interpret controversies on the specific issues. The reluctance by the Court to decide the question rests partly on confusion over whether strict liability for products is a fault concept similar to negligence, or a tort wholly distinct from negligence and warranty theories of liability.

In Luque v. McLean,[36] the Supreme Court held that "ordinary contributory negligence" is no defense in a strict liability action.

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[35]Most notably, the Grimshaw v. Ford case where $125 million (reduced on appeal to $7 million) in punitive damages were awarded because of a defective fuel tank design.

[36]Luque v. McLean, (1972) 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443.

However, the Court did recognize that a complete defense does exist when "the plaintiff's negligence . . . consists in voluntarily and unreasonably proceeding to encounter a known danger, more commonly referred to as assumption of the risk (Id.). For the defense to arise, the user or consumer of the product must be aware of the defect and danger and still proceed unreasonably to make use of the product. This type of hybrid contributory negligence/assumption of the risk defense was clarified by the Court in Horn v. General Motors Corp.[37] where the Court said not only must the plaintiff's conduct be deliberately risky, but the plaintiff must have actual knowledge of the hazardous defect.

The Supreme Court in Daly v. General Motors Corp.[38] introduced comparative principles in strict product liability actions. Daly involved the driver of an Opel automobile who died as a result of injuries sustained when ejected from the vehicle after it struck a median barrier on a freeway. The collision impact activated the door mechanism. The manufacturer had provided door locks and a combination shoulder harness-seat belt, either of which if used would probably have precluded decedent's injuries. Evidence was admitted that the decedent was intoxicated at the time of the accident. At the subsequent trial for wrongful death, the jury returned a verdict in favor of the defendant and the plaintiffs appealed. By a 4-3 majority, the Court, in an opinion by Justice

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[37] Horn v. General Motors Corp., (1976) 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78.

[38] Daly v. General Motors Corp., (1978) 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380.

Richardson, reversed the lower court ruling that the trial judge committed prejudicial error in admitting the intoxication evidence. The Supreme Court granted a new trial with directions that comparative fault concepts should be applicable in light of Li v. Yellow Cab Co. (supra).

The opinion notes the accident prevention incentive imposed on manufacturers would not be diluted under comparative fault principles:

> "Defendant's liability for injuries caused by a defective product remains strict. The principle of protecting the defenseless is likewise preserved, for plaintiff's recovery will be reduced only to the extent that his [her] own lack of reasonable care contributed to his [her] injury." (Id. at 737).

The Court also recognized the adoption of loss-spreading as a fundamental policy of strict liability and that it must be tempered by the fairness requiring each party bear the responsibility for his/her conduct:

> "The cost of compensating the victim of a defective product, albeit proportionately reduced, remains on defendant manufacturer and will, through him, be 'spread among society.' However, we do not permit plaintiff's own conduct relative to the product to escape unexamined, and as to that share of plaintiff's damages which flows from his own fault we discern no reason of policy why it should, following Li, be borne by others. Such a result would directly contravene the principle announced in Li that loss should be assessed equitably in proportion to fault." (Id.)

The principle objection to Daly (supra) is the method of comparing the negligence of the plaintiff with the strictly liable product. This "apples and oranges" comparison problem centers

on the alleged inability of the jury to adequately compare the responsibility of the parties and reduce damages accordingly. The Daly opinion offers, as one method of comparison, the trial court's requesting the jury through special interrogatories to:

> ". . . state in percentage the extent to which the plaintiff's own negligence contributed to his injuries. [T]he jury is instructed to indicate the amount of plaintiff's damages without reference to his own negligence. The court then reduces the damage award by the percentage figure the jury has supplied." (Id. at 743).

In response to the majority's opinion, Justice Jefferson in a strong dissent suggested the majority's reliance on the ability of the jury to make the comparison process is misplaced:

> "The majority's assumption that a jury is capable of making a fair apportionment between a plaintiff's negligent conduct and the defendant's defective product is no more logical or convincing than if the jury were to be instructed that it should add a quart of milk (representing plaintiff's negligence) and a metal bar three feet in length (representing defendant's strict liability for a defective product) and that the two added together equalled one hundred percent." (Id. at 751).

In an equally vigorous dissent, Justice Mosk felt the majority was injecting negligence principles into the wholly distinct tort of strict liability, without explicitly stating so:

> "The majority inject a foreign object--the tort of negligence--into the tort of product liability by the simple expedient of calling negligence something else: on some pages their opinion speaks of 'comparative fault,' on others reference is to 'comparative principles,' and elsewhere the term 'equitable apportionment' is employed, although that despite semantic camouflage they must rely on Li v. Yellow Cab Co., even though Li is purely and simply a negligence case which merely rejects contributory negligence." (Id. at 757).

Justice Mosk also criticized the majority's circumventing the practical implications of how a jury is to perform the task of comparing the plaintiff's contributory negligence against the strict liability of the product:

> "We also declared in Ault v. International Harvester Company, (1974) 13 Cal. 3d 113, that the focus is not on the conduct of the defendant, but on the nature of the product. That being so, the majority create an impossible dilemma for trial courts. If comparative negligence is to be applied, how can the trier of fact rationally weigh the conduct of the plaintiff against the defenctive product? I know of no other instance in American jurisprudence in which the antagonists are the conduct of a human being versus an inanimate object." (Id. at 762).

Rejecting the contentions that contributory negligence and strict liability do not merge, and that "apples and oranges" cannot be compared, the majority refused to be inflexible and apply rigid legal concepts believing it to be more important to be just and equitable than doctrinaire.

IV

RECOMMENDATIONS AND DISCUSSION

A. Recommendations Related to Product Liability Insurance.

1. THE LEGISLATURE AMEND THE CALIFORNIA REVENUE AND TAXATION CODE TO PERMIT BUSINESSES WITH QUALIFIED PRODUCT LOSS-MANAGEMENT PROGRAMS TO RECEIVE A TAX REBATE IN THE AMOUNT OF UNINSURED PRODUCT LIABILITY LOSSES. THE EXTENT OF AVAILABLE FUNDS WOULD BE EQUAL TO THE TAXES PAID OVER THE PRECEDING TEN YEARS.

The objective of this recommendation is to provide immediate relief for those manufacturers experiencing severe

insurance cost problems, as well as encouraging the business community to implement product loss-management programs to promote product safety.

Manufacturers participating in this program could purchase insurance with higher deductibles or lower limits because funds from the tax rebate would be used to offset liability losses. As more firms shared in this program, the demand for primary insurance would decrease and perhaps cause rates to go down to more affordable levels.

As a condition precedent to qualifying for the tax rebate benefits, a manufacturer would be required to implement a product loss prevention program in accordance with specific standards. A further objective of this recommendation is to promote the accident prevention policy of product liability.

Staff also recommends that the Legislature support Federal legislation allowing federal income tax rebates for uninsured product injury losses. Reimbursement cannot be significant unless done on both the state and federal levels.

2. THE LEGISLATURE AMEND THE CALIFORNIA REVENUE AND TAXATION CODE TO PERMIT BUSINESSES TO DEDUCT THE COST OF QUALIFIED PRODUCT LOSS PREVENTION PROGRAMS FROM TAXABLE INCOME.

In conjunction with Recommendation A1, this proposal is designed to encourage the widespread implementation of product loss prevention programs in the business industry. The need for such programs is clear. A recent survey indicates only 38 percent

of small companies have a product loss prevention program (See, Chilton's Iron Age, Our National Product Liability Crisis and Why You Are Part of It, August 1, 1977, at p. 90). More emphasis should be placed on the development of such programs through tax incentives.

In the long run, comprehensive product loss prevention systems should reduce insurance costs as the frequency and severity of claims decline. This proposal also minimizes the amount of governmental intervention in private industry. A manufacturer seeking to participate would be required to implement a product loss prevention program which complies with an agreed upon standard. The cost of the program would constitute a tax deduction.

3. THE LEGISLATURE AUTHORIZE AND DIRECT THE DEPARTMENT OF INSURANCE TO PROMULGATE RULES UNDER INSURANCE CODE SECTIONS 900 ET SEQ TO REQUIRE INSURANCE COMPANIES OPERATING IN CALIFORNIA TO EXPAND EXISTING STATISTICAL SYSTEMS TO INCLUDE WIDER USE OF PRODUCT LOSS EXPERIENCE IN DETERMINING RATES, AND TO REPORT TO THE COMMISSIONER PRODUCT LIABILITY CLAIM, LOSS EXPENSE AND LOSS INFORMATION.

The objective of this recommendation is to require the collection of information for insurance rate-making in order to assure the cost of product liability insurance is relevant to losses and is fair. The liability insurance industry has failed to maintain comprehensive data collection procedures to report

product liability loss experience. As a consequence, it is difficult if not impossible to obtain information on the volume of product liability insurance written and the frequency and severity of claims. Without the availability of such information on an industry-wide level, insurers are subject to criticism and possible unnecessary governmental regulation because of their inability to accurately relate insurance rates to claim frequency and severity.

Insurance costs have escalated dramatically and perhaps without apparent justification. The insurance industry as an advocate of proposed changes in the substantive law has failed to discharge its burden of proof that higher insurance rates are necessary as a consequence of higher losses.

The Insurance Services Office (ISO) has recently made an effort to improve the collection of product liability loss experience data. However, at present the ISO provides data in sufficient detail for only the "manual" rated classes representing an estimated 10 percent of the product liability exposures. The remaining 90 percent is divided into (a)-rated package policies and composite rated, loss-rated and large (a)-rated classifications and are available only in summary form (See, Exhibit A explaining the insurance rate-making terms).

B. Recommendations Related to the Substantive Law of Product Liability.

1. THE LEGISLATURE AMEND THE CIVIL CODE TO PROVIDE THAT IN STRICT PRODUCT LIABILITY CASES A PRODUCT IS DEFECTIVE IN DESIGN IF

IT FAILS TO PERFORM AS AN ORDINARY CONSUMER WOULD EXPECT OR WHEN USED IN AN INTENDED OR REASONABLY FORESEEABLE MANNER.

This recommendation is the codification of the California Supreme Court's decision in Barker v. Lull Engineering Company (supra, fn 31).

The presence of a product on the market is a tacit representation by the manufacturer that the product will safely perform the jobs for which it was built. Because the manufacturer receives profit from the sale of products, such manufacturer should be required to design products and anticipate a certain degree of misuse consistent with the expectations of the consumer.

However, the doctrine of strict liability was never intended or designed to be absolute liability. A manufacturer cannot be expected to design a "perfect" product that is incapable of injury. However, a manufacturer is expected to make a product which operates safely without subjecting the user to a substantial risk of harm. What the manufacturer should contemplate in the way of product use should be governed by the expectations of the ordinary consumer, and the reasonable foreseeability of the type of use. Incorporation of this recommendation into the California Civil Code will add a significant degree of certainty to the law of product liability.

2. THE LEGISLATURE PROVIDE BY STATUTE THAT IN STRICT LIABILITY DESIGN DEFECT CASES, AFTER THE PLAINTIFF SHOWS THE PRODUCT DEFECT

PROXIMATELY CAUSED HARM TO THE PLAINTIFF, THE DEFENDANT HAS THE BURDEN OF SHOWING THE BENEFITS OF THE CHALLENGED DESIGN OUTWEIGH THE RISKS INVOLVED.

AMONG FACTORS TO BE CONSIDERED BY THE TRIERS OF FACT ARE THE GRAVITY OF THE DANGER POSED BY THE CHALLENGED DESIGN, THE LIKELIHOOD THAT SUCH DANGER WOULD OCCUR, THE MECHANICAL FEASIBILITY OF A SAFER ALTERNATIVE DESIGN, THE FINANCIAL COST OF AN IMPROVED DESIGN, AND THE ADVERSE CONSEQUENCES TO THE PRODUCT AND TO THE CONSUMER THAT WOULD RESULT FROM AN ALTERNATIVE DESIGN.

This recommendation is a codification of the second portion of the California Supreme Court's holding in Barker v. Lull Engineering Company (Id.).

The objective of this recommendation, together with Recommendation B1, is to provide a greater degree of certainty in the law in California, and to establish a workable definition of design defect that respects both the rights of the plaintiff and defendant.

The first part of the proposal requires the plaintiff to establish by the preponderance of the evidence that the product was defective and was the proximate cause of injury. This is a plaintiff's burden and should not be changed.

The second portion of this proposal shifts the burden to the defendant to prove, through a risk versus benefit analysis, that the product was not defective. In a majority of cases, the defendant will have better access to technical information on the product design. The plaintiff with a valid claim should not be denied recovery simply because evidence on design defect is unavailable to him. The defendant should be required to show in light of relevant factors why the product should not be judged defective. In the long run, the risk-benefit analysis will be to a defendant's advantage because evidence of cost and design feasibility could then be introduced to demonstrate the reasonableness of the product design.

3. THE LEGISLATURE ADOPT BY STATUTE THE PRINCIPLES OF COMPARATIVE FAULT ENUNCIATED IN DALY V. GENERAL MOTORS (SUPRA) IN STRICT PRODUCT LIABILITY ACTIONS THROUGH EITHER 1) THE COMPARATIVE NEGLIGENCE PRINCIPLES ARTICULATED IN LI V. YELLOW CAB COMPANY (SUPRA), OR 2) THROUGH PROVISIONS OF THE UNIFORM COMPARATIVE FAULT ACT. (See Exhibit "C").

The objective of this recommendation is to incorporate into the California tort law the concept that the loss should be assessed equitably in proportion to fault. The manufacturer of a product cannot be the absolute insurer of the

consumer's injuries. When the consumer's conduct is unreasonable in using the product, that portion of the consumer's conduct which contributes to his/her injury should be weighed in apportioning the loss. Therefore, in product liability cases, the plaintiff's conduct should be compared against the defective product and damages apportioned in relation to the responsibility of both plaintiffs and defendants.

4. THE LEGISLATURE PROVIDE BY STATUTE A REBUTTABLE PRESUMPTION THAT A PRODUCT IS NOT DEFECTIVE IN DESIGN IF AT THE TIME OF MANUFACTURE THE PRODUCT COMPLIED WITH BOTH THE CUSTOM OF THE INDUSTRY AND ALL APPLICABLE FEDERAL AND STATE SAFETY STANDARDS.

Manufacturers and insurers have recommended an absolute state of the art defense barring actions based upon a design defect if the design was consistent with the manufacturing standards at the time of manufacture. However, because the custom within the industry may not reflect the state of the art which is technologically achievable, the Committee staff does not recommend an absolute state of the art defense based on industry custom. The conduct of the manufacturer should be tested to determine what was reasonable under the circumstances. Although this is not consistent with strict product liability theory, nevertheless under the principles of Li v. Yellow Cab Co. (supra) and Daly v. General Motors Corp. (supra), the responsibility of the manufacturer can be judged in a proper frame of reference in

determining if at the time of manufacture the product represented a level of design technology that did not expose the user to a substantial risk. The staff recognizes in some cases it is simply unfair to manufacturers to measure their products by a standard that was non-existent at the time the product was manufactured and could not have been subsequently implemented.

In the alternative, a reasonable compromise would be a statute creating a rebuttable presumption that the product represents the state of the art if at the time the product was made the design conformed with all industrial and governmental standards.

The net effect of the rebuttable presumption recommendation will be to increase the plaintiff's task in proceeding with a product case, while providing a degree of certainty in the law without creating an insurmountable procedural obstacle for cases with strong facts.

5. Product Modification or Alteration. Consumers frequently alter or modify products which result in injuries to the user. In these situations, it is unfair to impose liability upon the manufacturer who has no control over how the product is used. Unfortunately, the situation is generally not so clearcut. The manufacturer may anticipate or encourage a certain degree of product modification. Evidence of this may be seen in some motor vehicles which are traditionally modified because of custom among younger car owners. In such factual situations, when liability should be imposed presents a difficult issue.

It should be emphasized that a causal connection must exist between the modification and the injury before liability is precluded. However, if the injury would have occurred regardless of whether the product was modified, then post-production modification should not be a defense.

It appears that the present rules of law can accommodate a product modification or alteration as a valid defense. For example, under the doctrine of comparative responsibility (fault) as developed by Li v. Yellow Cab Co. (supra), and Daly v. General Motors Corp. (supra), modification of a product by a user would be one of the items considered in evaluating the comparative responsibility of that user in apportioning liability for the ultimate injury. Under principles of comparative responsibility, a manufacturer would not be liable for the total loss if the consumer's modification was a contributing cause of the injury. The loss would be allocated in accordance with the responsibility of each party. Therefore, the Committee staff does not recommend a modification or alteration defense statute at this time.

Our recommendation is to more clearly articulate the rules of comparative negligence or comparative responsibility to accommodate the situation which may arise through product modification or alteration.

6. Product Age and Statutes of Limitation. Products are purchased by consumers with the expectation the product will perform safely and for some period of time the task for which it was designed.

This expectation arises from the representations made by manufacturers through advertising which extol the durability and safety features of their products. This is particularly true in the sale of industrial goods. Manufacturers of industrial goods frequently make express representations that their product will perform safely for periods far in excess of the life span of common consumer products.[39] Consequently, as a matter of policy, the courts have generally refused to consider the age of the product as a defense to a product liability action.[40]

Manufacturers and insurance industry representatives have recommended a statute of limitations which would bar all claims on products over a specified age.

The proposed statute would commence to run at the date the product was manufactured or sold and continue to run for a specified number of years. After the expiration of the statutory period, all actions for injuries caused by the product would be barred.

California law requires an action to recover for personal injuries to be commenced within one year of the date of injury. (California Code of Civil Procedure, Section 340.) A special statute of limitations is applicable in medical malpractice

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[39] See, Product Liability Advisory Committee Hearing exhibits, September 15, 1978, on file with the Committee.

[40] See, Balido v. Improved Machinery, (1972) 29 Cal. App. 3d 633, 105 Cal. Rptr. 890, and Hale v. Depaoli, (1948) 33 Cal. 2d 228, 201 P.2d 1.

cases and requires the injured party to bring an action within four years of the date of injury, or within one year after the injured party discovers or should have discovered the injury (California Code of Civil Procedure, Section 340.5). These statutes are directed at providing the injured party with a reasonable time after discovery of the defendant's tortious act to file an action to recover for damages.

Proponents of the proposed statute of limitation claim that manufacturers are exposed to indefinite liability for products over which they have no control. They claim this indeterminate potential liability contributes to higher insurance costs and imposes an unfair economic burden on the manufacturer without a substantial justification.

Evidence compiled by the staff indicates the number and severity of claims that would be eliminated by a statute of limitation does not warrant the statute's enactment. Insurers estimate that eight years after the date of manufacture, 4 percent of the claims on products representing 10 percent of ultimate payment dollars have yet to occur (See, Insurance Services Office: Product Liability Closed Claim Survey, supra).

Further evidence reveals no reciprocal benefit would accrue to the public in return for enacting a statute of limitations. Manufacturing trade organizations and insurance companies advocate the statute as necessary to stabilize the product liability insurance market. However, the response from insurance representatives has been that no reductions in liability insurance costs

to the manufacturing industry can be expected as a result of such a statute (supra, fn 39). In exchange for creating a special immunity to a limited class of individuals, it appears the public would not realize a tangible benefit in the form of lower prices for consumer goods.

The primary barrier to acceptance of a statute of limitations is that certain undeniably meritorious claims would be barred before the injury occurs to the consumer. If the injury is not covered by insurance, the innocent party must absorb the loss and the manufacturer of the product is relieved of any responsibility for placing a defective product into the stream of commerce. Such a result cannot be justified when weighed against the accident prevention and compensation policies of product liability.

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EXHIBIT A

EXHIBIT "A"

Insurance contracts for product liability coverage may be offered through several types of policies with different rating mechanisms. The following are some of the more common policy types and rating mechanisms.

A. Monoline Policies. These policies are limited to bodily injury (BI) and Property Damage (PD) liability coverage for the product liability exposure of the insured. Some premiums for monoline policies are determined by reference to a rate manual which contains product classifications by the type of product risk involved, and a common unit of exposure (usually $1,000 of sales).

The current product classification plan, used by the majority of insurance companies, defines over 400 separate classes. Approximately 65 percent to 75 percent of these classes have been assigned a rate in a manual.

These assigned rates are referred to as "manual rates" and are based on a review of countrywide experience of similar product liability exposures. The basic limits for BI and PD premiums for a monoline policy for a manually rated product are determined by multiplying the manual rate by the unit of exposure ($1,000 of sales). Coverage in excess of the basic policy limit can be obtained for an additional premium which is computed by multiplying the basic premium rate.

The remaining monoline rating systems are "(a)-rated" (approximately 25 percent to 35 percent). Product classifications

which are not manually rated are "(a)-rated". Rather than being based upon similar product liability exposure experience, these rates are determined by an underwriter's estimate of the product's risk.

An example of an "(a)-rated" class is "valve manufacturers." Risks in this class will vary widely depending upon the exposure of each type of valve. Valves manufactured for an aircraft present a different risk than valves used in plumbing of private homes. Consequently, rates for these risks are determined separately based upon the insurance underwriter's informed judgment of the risk involved. Once the "(a)-rate" is established, the basic premium charge is calculated in the same manner as a monoline policy using manual rating procedures (i.e., rate x exposure unit). Monoline policies are usually purchased by small or medium risks.

B. Commercial Package (Multi-line) Policies. These policies usually provide a combination of coverages for the unsured's complete range of operational exposures. The commercial package policy premium is determined using a monoline rate method that is discounted to provide a package policy price. Statistics are not available regarding the number of commercial package policies that are priced using manual rating or "(a)-rating" techniques.

C. Composite-rated, Loss-rated and Large (a)-rated Policies. These policies provide a combination of coverages on either a multi-line or monoline basis. Premium calculations for each of these policies varies according to the need of the insured and the product liability exposure involved. These types of policies constitute a substantial amount of the total volume of product

liability insurance.

1. Composite-rated. Policies which are composite-rated are determined by a survey of the manual rates for each class. The sum total of the exposures and rates is then divided by a selected exposure unit to arrive at the single composite rate. Larger risks are generally covered by composite-rated policies.

2. Loss-rated. Loss-rated policies are used for risks that have resulted in $200,000 or more of losses within the past three years. The actual losses arising from the particular risk are used to determine the appropriate rate.

3. Large "(a)-rated". Large "(a)-rated" policies are designed to meet the needs of insureds with very large risk exposures which cannot accurately be determined on previous policy experience.

EXHIBIT B

EXHIBIT "B"

Table 1

YEAR	TOTAL	PLAINTIFFS	DEFENDANTS	NONSUIT	DISMISS
J/D-71	31	13	18	-	-
1972	56	31	24	1	-
1973	99	46	50	-	3
1974	89	40	49	-	-
1975	81	32	46	1	2
1976	105	52	50	1	2
1977	111	36	74	-	1
J/J-78	68	21	46	1	-
TOTAL	640	271	357	4	8

Table 2

Range of Verdict Awards

YEAR	$0 - $24,999	$25,000- $49,999	$50,000- $99,999	$100,000- $249,999	$250,000+
1971	4	3	2	2	1
1972	11	4	7	6	3
1973	19	10	3	9	5
1974	15	8	6	4	7
1975	8	7	5	6	15
1976	25	7	6	3	11
1977	18	7	2	7	2
1978	5	3	4	5	4
TOTAL	105	49	35	42	48

EXHIBIT C

EXHIBIT "C"

UNIFORM COMPARATIVE FAULT ACT

Historical Note

The Uniform Comparative Fault Act was approved by the National Conference of Commissioners on Uniform State Laws in 1977.

Commissioners' Prefatory Note

Plaintiff's Fault. The harsh all-or-nothing rule of contributory negligence at common law has not been properly ameliorated by the several exceptions also developed at common law. Whether the general rule or an exception applies, one party or the other is always treated unfairly. This has been widely recognized and, at the present time (1977), the Federal Government and two-thirds of the States (33) have adopted some form of comparative fault. This is usually by statute but also by judicial decision.

The language of the statutes varies considerably, and the form adopted often comes about as a result of a political compromise and without adequate consideration of the practical implications. This Uniform Act has been worked on for five years by a special committee, which has had the benefit of comments from many sources. Careful consideration has been given to all potential problems, and specific provisions are made for most of them. This Act therefore serves two important purposes: (1) it addresses the problems and provides what are regarded as the best solutions for them, and (2) it provides the opportunity for creating a desirable uniformity throughout the country.

A very important question arises in the very beginning: What type of comparative fault should be adopted? The "pure type" is presently followed by the Federal Government, seven states and almost all common law jurisdictions outside the United States. Many states, however, have adopted a modified type, which takes one of two forms, providing that a plaintiff who is at fault can recover diminished damages but that he cannot recover if his negligence either (1) "is equal to," or (2) "is greater than," that of the defendant.

The modified type has several serious logical and practical disadvantages:

1. If both parties have been injured, the modified type forces one party to bear all of his own loss, together with the greater part of the other party's loss, in addition. This result is therefore worse than that of the common law contributory negligence rule. A slight alleviation under the not-greater-than form, which allows recovery when the parties are each 50% at fault, forces a cognizant jury always to find for 50% negligence if it wants to reach a fair result.

2. If there are several defendants at fault, the modified type produces a confused jumble. The plaintiff's fault may be less than that of some defendants and greater than that of others. If defendants having to pay seek contribution from those not under obligation to the plaintiff, the answer is uncertain; and when counterclaims arise, no solution seems available. The problem is avoided in some modified-type states by providing that the plaintiff's negligence bars recovery only if it is greater than the combined negligence of all the defendants. Although this is a helpful provision, it is essentially adopting the pure form in this situation.

3. If the plaintiff's fault is greater than that of the defendant, he cannot recover under the modified type. Yet, if, as a result of this, the statute leaves him under the common law, including its exceptions (such as last clear chance, or ordinary contributory negligence in an action based on strict liability) he can nevertheless recover full damages, if he comes within an exception. The anomaly therefore arises that he may be better off if his negligence is found to be greater than that of the defendant and he thus recovers full damages; than if his negligence is found to be less than that of the defendant and his damages are diminished.

The single disadvantage urged against the pure type is that it fails to prevent the bringing of "nuisance suits." Yet the cure of the modified form is distinctly an overcure, and therefore worse than the disease. How many more times is the plaintiff's negligence likely to be from 51% to 90% of the total than

it is to be 90 to 100% of the total? And when it approximates 100%—the true nuisance claim—the trial court will usually control the matter.

The innate fairness of the pure type contrasts with the nondiscriminating rough justice of the modified type, which casts out many justified claims in order to be sure to eliminate a few unjustified ones, and impels the decision for the pure form. It is significant that in every instance in which a court, as distinguished from the legislature, has adopted a form of comparative fault, it has selected the pure type, and that England, Ireland, the Canadian provinces and Australian states have all adopted the pure form.

Contribution. The original common law rule was that there is no contribution among joint tortfeasors, no matter what the nature of the tort. Some states, however, have judicially modified this rule, especially in the case of negligence. Many more states have passed statutes of various kinds providing for contribution, with the result that a substantial majority of the states now have contribution in some form and the Restatement (Second) of Torts § 886A, now provides for it.

The NCCUSL has promulgated two uniform contribution Acts—the first in 1939, superseded by a revised act in 1955. Both of these Acts provide for pro rata contribution, which may be suitable in a state not applying the principle of comparative fault, but is inappropriate in a comparative-fault state apportioning ultimate responsibility on the basis of the proportionate fault of the parties involved.

It has therefore been decided not to amend the separate Uniform Contribution Among Tortfeasors Act, 1955, but to leave that Act for possible use by states not adopting the principle of comparative fault. Instead, the present Act contains appropriate sections covering the rights existing between the parties who are jointly and severally liable in tort. The 1955 Act should be replaced by this Act in any state that adopts the comparative fault principle, and would be eventually replaced.

UNIFORM COMPARATIVE FAULT ACT

Section 1. [Effect of Contributory Fault]

(a) In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

(b) "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Commissioners' Comment

This Section states the general principle, that a plaintiff's contributory fault does not bar his recovery but instead apportions damages according to the proportionate fault of the parties.

Harms Covered. The specific application of that principle, as provided for in this Act, is confined to physical harm to person or property. But it necessarily includes consequential damages deriving from the physical harm, such as doctor's bills, loss of wages or costs of repair or replacement of property. It does not include matters like economic loss resulting from a tort such as negligent misrepresentation, or interference with contractual relations or injurious falsehood, or harm to reputation resulting from defamation. But failure to include these harms specifically in the Act is not intended to preclude application of the general principle to them if a court determines that the common law of the state would make the application.

Conduct Covered. (a) Defendant's Conduct. The Act applies to "acts or omissions that are in any measure negligent or reckless toward the person or property . . . of others." This includes the traditional action for negligence but covers all negligent conduct, whether it comes within the traditional negligence action or not. It includes negligence as a matter of law, arising from court decision or criminal statute. "In any measure" is intended to cover all degrees and kinds of negligent conduct without the need of listing them specifically.

In some states reckless conduct goes by a different name, such as willful or wanton misconduct. The decision must be made in the particular state whether the language used is sufficiently broad for the purpose or if additional language is needed.

Although strict liability is sometimes called absolute liability or liability without fault, it is still included. Strict liability for both abnormally dangerous activities and for products bears a strong similarity to negligence as a matter of law (negligence per se), and the factfinder should have no real difficulty in setting percentages of fault. Putting out a product that is dangerous to the user or the public or engaging in an activity that is dangerous to those in the vicinity involves a measure of fault that can be weighed and compared, even though it is not characterized as negligence.

An action for breach of warranty is held to sound sometimes in tort and sometimes in contract. There is no intent to include in the coverage of the Act actions that are fully contractual in their gravamen and in which the plaintiff is suing solely because

he did not recover what he contracted to receive. The restriction of coverage to physical harms to person or property excludes these claims.

The Act does not include intentional torts. Statutes and decisions have not applied the comparative fault principle to them. But a court determining that the general principle should apply at common law to a case before it of an intentional tort is not precluded from that holding by the Act.

For certain types of torts, such as nuisance, the defendant's conduct may be intentional, negligent or subject to strict liability. In the latter two instances the Act would apply, but not in a case in which the defendant intentionally inflicts the injury on the plaintiff.

A tort action based on violation of a statute is within the coverage of the Act if the conduct comes within the definition of fault and unless the statute is construed as intended to provide for recovery of full damage irrespective of contributory fault.

(b) Plaintiff's Conduct. "Fault," as defined in Subsection (b), includes conduct of the plaintiff or other claimant, as well as a defendant.

"Contributory fault chargeable to the claimant" includes legally imputed fault as in the cases of principal and agent and of an action for loss of services of a spouse. It also covers a situation in which fault is not imputed but would still have barred recovery prior to passage of the Act—as, for example, a wrongful-death action in which the decedent's contributory negligence would have barred recovery even though it was not imputed to the person bringing the action.

Contributory fault diminishes recovery whether it was previously a bar or not, as, for example, in the case of ordinary contributory negligence in an action based on strict liability or recklessness. Last clear chance is expressly included with its variations.

"Assumption of risk" is a term with a number of different meanings—only one of which is "fault" within the meaning of this Act. This is the case of unreasonable assumption of risk, which might be likened to deliberate contributory negligence and means that the conduct must have been voluntary and with knowledge of the danger. As used in this Act, the term does not include the meanings (1) of a valid and enforceable consent (which is treated like other contracts), (2) of a lack of violation of duty by the defendant (as in the failure of a landowner to warn a licensee of a patent danger on the premises), or (3) of a reasonable assumption of risk (which is not fault and should not have the effect of barring recovery).

"Misuse of a product" is a term also with several meanings. The meaning in this Section is confined to a misuse giving rise to a danger that could have been reasonably anticipated and guarded against. The Act does not apply to a misuse giving rise to a danger that could not reasonably have been anticipated and guarded against by the manufacturer, so that the product was therefore not defective or unreasonably dangerous.

The doctrine of avoidable consequences is expressly included in the coverage.

Causation. For the conduct stigmatized as fault to have any effect under the provisions of this Act it must have had an adequate causal relation to the claimant's damage. This includes the rules of both cause in fact and proximate cause.

"Injury attributable to the claimant's contributory fault" refers to the requirement of a causal relation for the particular damage. Thus, negligent failure to fasten a seat belt would diminish recovery only for damages in which the lack of a seat-belt restraint played a part, and not, for example, to the damage to the car. A similar rule applies to a defendant's fault; a physician, for example, negligently setting a broken arm, is not liable for other injuries received in an automobile accident.

Section 2. [Apportionment of Damages]

(a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under Section 6, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating:

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under Section 6. For

this purpose the court may determine that two or more persons are to be treated as a single party.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under Section 6, and enter judgment against each party liable on the basis of rules of joint-and-several liability. For purposes of contribution under Sections 4 and 5, the court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(d) Upon motion made not later than [one year] after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

Commissioners' Comment

Parties. It is assumed that the state procedure provides for bringing in third-party defendants as parties. If not, the procedural statutes or rules may need to be amended to permit it, at least for purposes of contribution.

The limitation to parties to the action means ignoring other persons who may have been at fault with regard to the particular injury but who have not been joined as parties. This is a deliberate decision. It cannot be told with certainty whether that person was actually at fault or what amount of fault should be attributed to him, or whether he will ever be sued, or whether the statute of limitations will run on him, etc. An attempt to settle these matters in a suit to which he is not a party would not be binding on him. Both plaintiff and defendants will have significant incentive for joining available defendants who may be liable. The more parties joined whose fault contributed to the injury, the smaller the percentage of fault allocated to each of the other parties, whether plaintiff or defendant.

In situations such as that of principal and agent, driver and owner of a car, or manufacturer and retailer of a product, the court may under appropriate circumstances find that the two persons should be treated as a single party for purposes of allocating fault.

Percentages of fault. In comparing the fault of the several parties for the purpose of obtaining percentages there are a number of implications arising from the concept of fault. The conduct of the claimant or of any defendant may be more or less at fault, depending upon all the circumstances including such matters as (1) whether the conduct was mere inadvertence or engaged in with an awareness of the danger involved, (2) the magnitude of the risk created by the conduct, including the number of persons endangered and the potential seriousness of the injury, (3) the significance of what the actor was seeking to attain by his conduct, (4) the actor's superior or inferior capacities, and (5) the particular circumstances, such as the existence of an emergency requiring a hasty decision.

A rule of law that a particular defendant owes a higher degree of care (as in the case of a common carrier of passengers) or a lesser degree of care (as in the case of an automobile host in a state having a valid automobile-guest statute) or that no negligence is required (as in the case of conducting blasting operations in an urban area) is important in determining whether he is liable at all. If the liability has been established, however, the rule itself does not play a part in determining the relative proportion of fault of this party in comparison with the others. But the policy behind the rule may be quite important. An error in driving on the part of a bus driver with a load of passengers may properly produce an evaluation of greater fault than the same error on the part of a housewife gratuitously giving her neighbor a ride to the shopping center; and an auto-

mobile manufacturer putting out a car with a cracked brake cylinder may, even in the absence of proof of negligence in failing to discover the crack, properly be held to a greater measure of fault than another manufacturer producing a mechanical pencil with a defective clasp that due care would have discovered.

In determining the relative fault of the parties, the fact-finder will also give consideration to the relative closeness of the causal relationship of the negligent conduct of the defendants and the harm to the plaintiff. Degrees of fault and proximity of causation are inextricably mixed, as a study of last clear chance indicates, and that common law doctrine has been absorbed in this Act. This position has been followed under statutes making no specific provision for it.

Joint and Several Liability and Equitable Shares of the Obligation. The common law rule of joint-and-several liability of joint tortfeasors continues to apply under this Act. This is true whether the claimant was contributorily negligent or not. The plaintiff can recover the total amount of his judgment against any defendant who is liable.

The judgment for each claimant also sets forth, however, the equitable share of the total obligation to the claimant for each party, based on his established percentage of fault. This indicates the amount that each party should eventually be responsible for as a result of the rules of contribution. Stated in the judgment itself, it makes the information available to the parties and will normally be a basis for contribution without the need for a court order arising from motion or separate action.

Reallocation. Reallocation of the equitable share of the obligation of a party takes place when his share is uncollectible.

Reallocation takes place among all parties at fault. This includes a claimant who is contributorily at fault. It avoids the unfairness both of the common law rule at joint-and-several liability, which would cast the total risk of uncollectibility upon the solvent defendants, and of a rule abolishing joint-and-several liability, which would cast the total risk of uncollectibility upon the claimant.

Control by the court. The total of the several percentages of fault for the plaintiff and all defendants, as found in the special interrogatories, should add up to 100%. Whether the court will inform the jury of this will depend upon the local practice.

The court should be able to exercise any usual powers under existing law of setting aside or modifying a verdict if it is internally inconsistent or shows bias or prejudice, etc. On the same basis as the remittitur principle, a court might indicate its intent to set aside a percentage allocation unless the parties agreed to a somewhat different one.

Illustration No. 1. (Simple 2-party situation).

A sues B. A's damages are $10,000.
A is found 40% at fault.
B is found 60% at fault.
A recovers judgment for $6,000.

Illustration No. 2. (Multiple-party situation).

A sues B, C and D. A's damages are $10,000.
A is found 40% at fault.
B is found 30% at fault.
C is found 30% at fault.
D is found 0% at fault.
A is awarded judgment jointly and severally against B & C for $6,000. The court also states in the judgment the equitable share of the obligation of each party:
A's equitable share is $4,000 (40% of $10,000).
B's equitable share is $3,000 (30% of $10,000).
C's equitable share is $3,000 (30% of $10,000).

Illustration No. 3. (Reallocation computation under Subsection (d)).

Same facts as in Illustration No. 2.
On proper motion to the court, C shows that B's share is uncollectible. The court orders that B's equitable share be reallocated between A and C.
A's equitable share is increased by $1,714 (4/7 of $3,000).
C's equitable share is increased by $1,286 (3/7 of $3,000).

Section 3. [Set-off]

A claim and counterclaim shall be set off, and only the difference between them is recoverable in the judgment. However, if either or both of the claims are covered by liability insurance and an insurance carrier's liability under its policy is reduced by reason of the set-off, the insured is entitled to recover from the carrier the amount of the reduction. Amounts so recovered shall be credited against pertinent liability policy limits. For pur-

poses of uninsured-motorist and similar coverages, the amounts so recovered shall be treated as payment of those amounts to the Insured by the party liable.

Commissioners' Comment

Set-off. A set-off always involves a single claim and counterclaim. If there are multiple defendants, separate set-off issues may exist between a claimant and several defendants. Similarly in the case of a cross-claim subject to a counterclaim.

This Section adopts the policy that the benefit of a judgment should run to the person to whom it is awarded rather than his insurance carrier and that when set-off confers the benefit of the judgment on the carrier, the carrier has been enriched at the expense of its insured and should make reimbursement.

This Section is much fairer than a provision that there shall be no set-off. The two solutions reach the same satisfactory end-result when both parties have adequate insurance or are fully solvent. The no set-off provision, however, unfairly penalizes the party who can pay his obligation, if the other party is unable to pay. It would be possible to take care of this problem of unfairness under a no set-off approach but only by means of express provisions that are complicated, confusing and difficult to administer. This Section takes care of the whole problem fairly and simply, and makes complete provision for what happens when the case goes to judgment.

Illustration No. 4. (No liability insurance).

A sues B; B counterclaims. Each suffered $100,000 in damage. Neither has liability insurance.

A is found 30% at fault. (If no set-off, would recover $70,000 and be liable for $30,000).

B is found 70% at fault. (If no set-off, would recover $30,000 and be liable for $20,000).

Set-off applies and A recovers a net judgment of $40,000.

Illustration No. 5. (Full liability insurance).

Same facts as in Illustration No. 4, except that there is full liability insurance of both parties.

A's carrier pays no judgment to B because of set-off.

The set-off reduced its policy liability by $30,000; and it must pay A the amount of that benefit.

B's carrier must pay the net judgment of $40,000 to A. Its policy liability has been reduced by $30,000, and it must pay the amount of that benefit to B.

Illustration No. 6. (Incomplete liability insurance for one party).

Same facts as in Illustration No. 4, except each party has $30,000 liability insurance.

A's carrier pays no judgment to B because of the set-off.

Its policy liability was reduced by $30,000; and it must pay A the amount of that benefit.

B's carrier pays $30,000 on the judgment to A and pays B nothing. B remains liable to A for $10,000.

Illustration No. 7. (Effect of uninsured-motorist coverage).

Same facts as in Illustration No. 4, except A is uninsured and B has full liability coverage and $20,000 uninsured-motorist coverage.

(a) Assume that B's carrier has already paid A's $40,000 net judgment (as computed in #4, above): Since B's carrier's liability under its policy has been reduced by $30,000 because of the set-off, B would be entitled to recover $30,000 from his carrier.

However, for purposes of UM coverage, this amount is treated as a payment by A to B, and since this constitutes A's liability to B, B's carrier has no liability to B.

(b) Now assume that B's carrier has already paid him the $20,000 UM benefits:

Since B's carrier liability under its policy has been reduced by $30,000 because of set-off, B is entitled to recover $30,000 from his carrier.

For purposes of UM coverage, however, that amount is treated as a payment from A to B, and B's carrier is subrogated to this sum in the amount of $20,000 because of the UM payment.

Therefore B's carrier pays B an additional $10,000 ($30,000 minus $20,000).

Thus, under both assumptions (a) and (b), whether the carrier pays the liability coverage or the UM coverage first, its out-of-pocket payment is $70,000.

Section 4. [Right of Contribution]

(a) A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death, or harm, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution is each person's equitable share of the obligation, including the equitable share of a claimant at fault, as determined in accordance with the provisions of Section 2.

(b) Contribution is available to a person who enters into a settlement with a claimant only (1) if the liability of the person against whom contribution is sought has been extinguished and (2) to the extent that the amount paid in settlement was reasonable.

Commissioners' Comment

Sections 4, 5 and 6 are expected to replace the Uniform Contribution Among Tortfeasors Act (1955) in a state following the principle of comparative fault. The three sections, however, apply whether the plaintiff was contributorily at fault or not.

Section 4 is in general accord with the provisions of the 1955 Uniform Act, but the test for determining the measure of contribution and thus establishing the ultimate responsibility is no longer on a pro rata basis. Instead, it is on a basis of proportionate fault determined in accordance with the provisions of Section 2. A plaintiff who is contributorily at fault also shares in the proportionate responsibility.

Joint-and-several liability under the common law means that each defendant contributing to the same harm is liable to him for the whole amount of the recoverable damages. This is not changed by the Act. Between the defendants themselves, however, the apportionment is in accordance with the equitable shares of the obligation, as established under Section 2.

If the defendants cause separate harms or if the harm is found to be divisible on a reasonable basis, however, the liability may become several for a particular harm, and contribution is not appropriate. See Restatement (Second) of Torts § 433A (1965).

Section 5. [Enforcement of Contribution]

(a) If the proportionate fault of the parties to a claim for contribution has been established previously by the court, as provided by Section 2, a party paying more than his equitable share of the obligation, upon motion, may recover judgment for contribution.

(b) If the proportionate fault of the parties to the claim for contribution has not been established by the court, contribution may be enforced in a separate action, whether or not a judgment has been rendered against either the person seeking contribution or the person from whom contribution is being sought.

(c) If a judgment has been rendered, the action for contribution must be commenced within [one year] after the judgment becomes final. If no judgment has been rendered, the person bringing the action for contribution either must have (1) discharged by payment the common liability within the period of the statute of limitations applicable to the claimant's right of action against him and commenced the action for contribution within [one year] after payment, or (2) agreed while action was pending to discharge the common liability and, within [one year] after the agreement, have paid the liability and commenced an action for contribution.

Commissioners' Comment

Illustration No. 8. (Equitable shares previously established by court).

A sues B and C. His damages are $20,000.

A is found 40% at fault.

B is found 30% at fault.

C is found 30% at fault.

A, with a joint-and-several judgment for $6,000 against B and C, collects the whole amount from B.

On proper motion to the court, B is entitled to contribution from C in the amount of $3,000.

Illustration No. 9. (Equitable shares not established).

A sues B. His damages are $20,000.

A is found 40% at fault.

B is found 60% at fault.

Judgment for A for $12,000 is paid by B.

B then brings a separate action seeking contribution from C, who was not a party to the original action.

C is found to be liable for the same injury, and as between B and C, C is found to be 50% at fault.

Judgment for contribution for $6,000 is awarded to B.

If A had voluntarily joined or been brought in as a party to this second action, proportionate fault would have been determined for all parties, including A and B, and contribution against C would have been awarded on that basis.

Section 6. [Effect of Release]

A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of Section 2.

Commissioners' Comment

Effect of release on liability of other tortfeasors. The provision that release of one tortfeasor does not release the others unless the release so provides is taken from the Uniform Contribution Among Tortfeasors Act (1955). It is a common statutory provision.

Effect of release on right of contribution. The question of the contribution rights of tortfeasors A and B against tortfeasor C, who settled and obtained a release or covenant not to sue admits of three answers: (1) A and B are still able to obtain contribution against C, despite the release, (2) A and B are not entitled to contribution unless the release was given not in good faith but by way of collusion, and (3) the plaintiff's total claim is reduced by the proportionate share of C. Each of the three solutions has substantial disadvantages, yet each has been adopted in one of uniform acts. The first solution was adopted by the 1939 Uniform Contribution Act. Its disadvantage is that it discourages settlements; a tortfeasor has no incentive to settle if he remains liable for contribution. The second solution was adopted by the 1955 Contribution Act. While it theoretically encourages settlements, it may be unfair to the other defendants and if the good-faith requirement is conscientiously enforced settlements may be discouraged.

The third solution is adopted in this Section. Although it may have some tendency to discourage a claimant from entering into a settlement, this solution is fairly based on the proportionate-fault principle.

"Discharges . . . from all liability for contribution." A reallocated share of contribution, as provided in Section 2(d), comes within the meaning of this phrase, and the discharge of the released person under this Section applies to that liability as well. Since the claim is reduced by the amount of the released person's equitable share, the increased amount of that share as a result of the reallocation is charged against the releasing person.

Illustration No. 10. (Effect of release).

A was injured through the concurrent negligence of B, C and D. His damages are $20,000. A settles with B for $2,000.

The trial produces the following results:

A, 40% at fault (equitable share, $8,000)

B, 30% at fault (equitable share, $6,000)
C, 20% at fault (equitable share, $4,000)
D, 10% at fault (equitable share, $2,000)

A's claim is reduced by B's equitable share ($6,000). He is awarded a judgment against C and D, making them jointly and severally liable for $6,000.

Their equitable shares of the obligation are $4,000 and $2,000 respectively. *Illustration No. 11.* (Release to one tortfeasor; another's share is uncollectible).

Same facts as in Illustration No. 10. It is now found that D's share of $2,000 is uncollectible. Upon proper motion to the court that share is reallocated as follows:

A's equitable share is increased by ⅔ (his own proportionate fault), plus ⅔ (B's proportionate fault), or $1,556.

C's equitable share is increased by ⅓, or $444.

Immunities. The problem of a wrongdoer who is entitled to a legal immunity could be treated like a released tortfeasor in this Section—join him to the action to determine his equitable share of the obligation and subtract it from the amount of the claimant's recovery. But this would unfairly cast the whole loss on the claimant. This might be adjusted by spreading the immune party's obligation among all of the parties at fault, including the claimant, as in Subsection 2(d). But this same result is also accomplished by leaving the immune party out of the action altogether; a far easier and simpler solution. This Act therefore makes no provision for immunities. It must be borne in mind, however, that some states treat some immunities as not applying to a suit for contribution. This raises different problems, which can be handled under third-party practice.

Worker's compensation. An injured employee who has received or is entitled to worker's compensation benefits from his employer may ordinarily bring a tort action against a third party, such as the manufacturer of the machine that injured him, and recover for his injury in full. Under the rule in most states, the defendant is not entitled to contribution from the employer, even though the employer was negligent in maintaining the machine or instructing the employee in its use. This casting of the whole loss on the tort defendant may be unfair and greatly in need of legislative adjustment. It is so affected by the policies underlying the worker's compensation systems, however, and these policies vary so substantially in the several states that it was felt inappropriate to include a section on the problem in a uniform act.

Several solutions are possible. Thus, contribution against the employer may be provided for. Or the recovery by the employee may be reduced by the proportionate share of the employer. Or the amount of that proportionate share may be divided evenly between the employer and employee, so that the compensation system bears responsibility for it. Provision also needs to be made for the relation of the tort defendant to the compensation benefits. In any event, contributory negligence on the part of the employee will come within the scope of this Act and will affect the amount of recovery.

Section 7. [Uniformity of Application and Construction]

This Act shall be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.

Section 8. [Short Title]

This Act may be cited as the Uniform Comparative Fault Act.

Section 9. [Severability]

If any provision of this Act or application of it to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

Section 10. [Prospective Effect of Act]

This Act applies to all [claims for relief] [causes of action] accruing after its effective date.

Section 11. [Repeal]

The following acts and parts of acts are repealed:

Commissioners' Comment

A state that has adopted either of the two Uniform Contribution Among Tortfeasors Acts will of course plan to repeal it. This is also true of other statutory provisions on contribution for tortfeasors.

This Act does not necessitate any changes in the statutory language of Article 2 of the Uniform Commercial Code, but it may have the effect of slightly modifying some of the Comments to §§ 2–314 to 2–316 and 2–715 on proximate cause and the effect of contributory fault.

E X H I B I T D

BARKER v. LULL ENGINEERING CO. (1978) 20 C.3d 413

Plaintiff: Ray P. Barker

Defendants: Lull Engineering Co., manufacturer of the High Lift Loader;
George M. Philpott Co., Inc., lessor of the High Lift Loader.

Intervener: Employers Insurance of Wausau

General Issue Before the Court:

Although defendants in Barker contended that the decision in Cronin v. J.B.E. Olson Corp. (1972, 8 Cal. 3d 121) was limited to manufacturing defects, as opposed to design defects, the issue before the Court in Barker, nevertheless the Court stated that Cronin answered the defect argument. The matter before the Court in this instance involved an instruction given the jury "that strict liability for a defect in design of a product is based on a finding that the product was unreasonably dangerous for its intended use. . ." The objectionable terms are "unreasonably dangerous" and "intended use".

Proceeding in Trial Court:

Plaintiff, Barker, brought an action to recover for damages resulting from injuries sustained while operating the High Lift Loader. Plaintiff claimed that the injuries were caused by, among other things, the defective design of the Loader. After trial, the jury returned a verdict in favor of the defendants. The plaintiff appealed from the judgment entered upon that verdict.

Proceeding on Appeal:

The appeal is based upon plaintiff's objection to an instruction given by the trial court in light of Cronin v. J.B.E. Olson Corp. (1972, 8 Cal. 3d 121). The trial court committed error by instructing the jury "that strict liability for a defect in design of a product is based on a finding that the product was unreasonably dangerous for its intended use . . ." (Barker v. Lull Engineering Co., supra. p. 417).

Defendants contended that Cronin v. J.B.E. Olson, supra., was concerned with a manufacturing defect, as opposed to a design defect, the matter at issue in this case. According to

defendants, the instruction was consistent with Cronin when the Cronin holding is applied to a design defect. According to defendant, all plaintiff had to prove was that the product was unreasonably dangerous and, therefore, it was defective in design. The Court rejected the contention.

(Aside: When defect is discussed in terms of product liability, it should be thought of as, 1) defect in design, or 2) defect in the manufacturing process, or 3) because dangers which may be associated with the proper use of the product require a warning by the manufacturer. This case concerns design defect.)

The Court utilized the appeal to alleviate some of the confusion that Cronin v. J.B.E. Olson Corp., supra., may have caused with respect to the definition of design defect.

Facts:

1. Involved in this case is a Lull High Lift Loader manufactured in 1967 and designed to lift loads of 5,000 pounds to a maximum height of 32 feet. It weighs 17,050 pounds, is 23 feet long by 8 feet wide, and is equipped with four large rubber tires which are about the height of a person's chest. Traction is provided by four-wheel drive with an automatic transmission having no "park" position (but there is a hand brake). The lifting mechanism consists of forks similar to the forks of a forklift and the Loader is designed to operate on uneven terrain with a leveling mechanism. A lever adjacent to the steering column and positioned between the operator's legs controls the leveling mechanism. A manual lock can be engaged to prevent the slipping of the load leveling lever.

The cab, covered by a pipe cage and wire mesh over the driver's seat, and located at least nine feet behind the lifting mechanism, affords some protection from a falling object. However, the cab is not equipped with either seat belts or a roll bar.

2. On the date of the accident, the regular Loader operator, Bill Dalton, did not report for work. Plaintiff, who had only occasionally operated the Loader, was designated to operate it.

3. Plaintiff was to lift a load of lumber approximately 18 to 20 feet to the second story of a building being constructed. The terrain in the lifting area sloped sharply in several directions.

Approaching the structure, plaintiff leveled the forks to compensate for the sloping ground and raised the load to a height estimated at between 10 and 18 feet, when he felt some

vibration. Several of his co-workers, believing the load was about to tip, shouted to plaintiff to jump from the Loader. Plaintiff jumped, but while scrambling from the machine was struck by a piece of falling lumber and suffered serious injury.

Conclusions of the Court:

1. The instruction given by the trial court relative to the product being unreasonably dangerous for its intended use was erroneous and judgment in favor of the defendants must be reversed.

2. A product may be found defective in design if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.

3. A product may be found defective in design, even if it satisfies ordinary consumer expectations if, through hindsight, the jury determines that the product's design embodies "excessive preventable danger" or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design.

Discussion:

The facts are generally not in dispute, however, the parties had different contentions relative to the facts. Plaintiff based his contentions and cause of action on the alleged design defects of the Loader.

1. Defendants contended that the accident resulted either from the plaintiff's lack of skill, or the misuse of the product. For the design defects, plaintiff presented expert witnesses who testified . . .

> "that the loader was unstable when working with high loads. In order to overcome this instability, the loader should have been equipped with outriggers. Plaintiff presented evidence that cranes and some high lift loaders are equipped with outriggers or offer outriggers as optional equipment."

2. The Loader was defective in that it was not equipped with a roll bar or seat belts. The presence of seat belts and a roll bar would protect the operator from falling material in the event the load started to tip or the machine rolled over.

3. The Loader was defective in design in that the leveling mechanism lever did not have an automatic locking device on it and was placed in such a position as to be vulnerable to inadvertent bumping.

4. The absence of a "park" position on the Loader's transmission allowed the Loader to move during the lift.

The defendants contended, through their expert witnesses, that:

1. The Loader was not unstable when utilized on the terrain for which it was intended. In this case, if the Loader tilted or shifted it was because of the terrain which was too steep for its intended operation. The expert attributed the accident to the misuse of the equipment by the plaintiff.

2. Outriggers are not necessary when the Loader is used for its intended purpose, and no competitive loaders with similar height lifting capacity are equipped with outriggers. Defendants' experts, however, conceded that a competitive machine capable of lifting loads to forty feet (compared to the Loader in question which had a capacity of lifting 32 feet) offered outriggers as optional equipment. The expert also contended that the addition of outriggers would give the Loader the functional capacity of a crane and would be a further indication to an experienced user of a high lift loader that such high lift loader is not a substitute for a crane.

3. A roll bar is unnecessary because the bulk of the Loader precluded a roll over.

4. Seat belts would have increased the danger by impairing the operator's ability to leave the vehicle quickly in case of an emergency.

5. The leveling device lever was positioned in the safest and most convenient place for the operator. The device was equipped with a manual lock and provided adequate protection.

6. The absence of the "park" position on the transmission was not a defect because none of the transmissions manufactured for this type of vehicle have a "park" position.

7. The accident was probably caused by plaintiff's inexperience and his dangerous actions. The plaintiff failed to lock the leveling device and that would have been the cause of the load shifting.

8. Hypothetically, the lumber fell only after the plaintiff had leaped from the machine. Further, the plaintiff was responsible for his injuries because he failed to set the handbrake.

Based upon the conflicting evidence, the jury, by a 10 to 2 vote, returned the verdict in favor of the defendants.

The plaintiff's contention was that the Court erred when instructing the jury as it did because such instruction conflicted with the decision in Cronin v. J.B.E. Olson, supra. Cronin involved a bread delivery truck which had a defective hasp which was to retain the trays of bread behind the driver. During an accident, the hasp broke and the driver was injured when the trays slid forward, striking plaintiff and sending him through the windshield. In Cronin, the defendant maintained that the product's "unreasonable dangerousness" was an essential element that plaintiff must establish in any product case. The Court rejected that contention saying that that burden upon the plaintiff exceeded the burden which was placed upon a plaintiff in Greenman v. Yuba Power Products, Inc. (1963, 59 Cal. 2d 57). Defendant's contention is that the manufacturing defect which was in issue in Cronin placed a dual burden upon the plaintiff in that the plaintiff would have to prove, 1) that the product was defective, and 2) that it was unreasonably dangerous. In a design defect case, according to the defendant, the plaintiff need only prove that the product was unreasonably dangerous and, therefore, defectively designed.

The Court rejected the defendant's contentions and said that the objection to the unreasonably dangerous terminology was based upon the determination that that concept represented an undue restriction on the application of strict liability principles. The opinion pointed out that in the case of Luque v. Mclean (1972, 8 Cal. 3d 136), "a power rotary lawn mower with an unguarded hole could properly be found defective, in spite of the fact that the defect in the product was patent and hence in all probability within the reasonable contemplation of the ordinary consumer." (Barker v. Lull Engineering Co., supra. p. 425). The Court explained ordinary consumer expectations are relevant to the defectiveness issue. The Restatement view and the defendant's contention regarding "unreasonably dangerous" are treated as a ceiling on the manufacturer's responsibility. However, the Court found that it should in reality be the floor, as indicated by past California decisions. At a minimum, a product must meet ordinary consumer expectations as to safety to avoid being found defective.

The Court also discussed the "intended use" language and said that the instruction was additionally erroneous because it is not the intended use, but the reasonably foreseeable use which is important and, as is stated in Cronin, "the design and manufacture of products should not be carried out in an industrial vacuum but with recognition of the realities of their everyday use." (Barker v. Lull Engineering Co., supra. p. 425, F.N.9).

The Court also stated that Cronin reaffirmed the basic formulation of strict tort liability set forth in Greenman that "a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." (Barker, supra. p. 427, quoting Cronin).

The Court also stated "that a plaintiff satisfies his burden of proof under Greenman in both a 'manufacturing defect' and 'design defect' context, when he proves the existence of a 'defect' and that such defect was a proximate cause of his injuries." (Barker, supra. p. 427).

Defect, according to the Court, includes a number of deficiencies:

1. A deviation from the manufacturers' intended result, e.g., an exploding soda bottle;

2. Unsafeness because of an absence of a safety device;

3. Danger because of a lack of adequate warning or instruction, e.g., a sun filter attachment on a telescope, the absence of which resulted in the damaging of a child's retina.

According to the opinion, "in general, a manufacturing or production defect is readily identifiable because a defective product is one that differs from the manufacturer's intended result or from other ostensibly identical units of the same product line." (Barker, supra. p. 429). And in terms of the case, the Court stated, "first, our case is established that a product may be found defective in design if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or foreseeable manner." (Barker, supra. p. 429). Further, "implicit in [a product's] presence on the market [is] a representation that it [will] safely do the jobs for which it was built." (Barker, supra. p. 430). The plaintiff, pursuant to this standard, can demonstrate defectiveness by resorting to circumstantial evidence.

Second, "a product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies 'excessive preventable danger,' or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design." (Barker, supra. p. 430). In this case, "a jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the

likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design." (Barker, supra. p. 431).

The Court discussed the burden of proof that is assigned in establishing the various facets of defectiveness, emphasizing that "one of the principal purposes behind the strict liability doctrine is to relieve an injured plaintiff of many of the onerous evidentiary burdens inherent in a negligence cause of action." (Barker, supra. p. 431). Therefore, the burden is such that when the plaintiff makes a prima facia showing that the injury was proximately caused by the product's design, the burden shifts to the defendant who must prove that in light of the relevant factors, the product is not defective. The Court points out that as a matter of public policy, "a manufacturer who seeks to escape liability for an injury proximately caused by its product's design on a risk-benefit theory should bear the burden of persuading the trier of fact that its product should not be judged defective." (Barker, supra. pp. 431-432). In this instance, the defendants' burden is one affecting the burden of proof rather than the burden of producing evidence.

(Aside: The burden of producing evidence is a question of law. That is to say, the person having the burden must satisfy the trier of law that there is sufficient evidence to go to the trier of fact so that the trier of fact can make a determination based on the evidence. The burden of proof includes the burden of producing evidence; that is to say, the party with the burden of proof must satisfy the trier of law that there is enough to go to the jury on a fact question, but then, in addition, he has the burden of persuading the trier of fact on the issue and the usual degree of proof necessary in that respect is a preponderance of evidence.)

In this case, the plaintiff has the burden of proving 1) an injury, and 2) the proximate causation of such injury by the product's design. The burden then shifts to the defendants who have the burden of proof under the risk-benefit theory.

The opinion concludes that the defective design test enunciated by the Court is appropriate in light of the rationale and limits of strict liability, "for it subjects a manufacturer to liability whenever there is something 'wrong' with a product's design--either because the product fails to meet ordinary consumer expectations as to safety or because, on balance, the design is not as safe as it should be--while stopping short of making the manufacturer an insurer for all injuries which may result from the use of its product." (Barker, supra. p. 432).

The Court also discussed the jury function of weighing the effects of alternative designs. Thus, the trier of fact might consider whether an alternative design, although eliminating the particular accident, might be more hazardous in other situations. Also pointed out was that the taking of reasonable precautions by a manufacturer in an attempt to design a safe product may be relevant in negligence actions, but does not preclude the imposition of liability in strict liability actions.

The opinion concluded, "we hold that a trial judge may properly instruct the jury that a product is defective in design 1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or 2) if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove, in light of the relevant factors discussed above, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design." (Barker v. Lull Engineering Co., supra. p. 435).

EXHIBIT E

78-678

Report to the California Legislature's Joint Committee on Tort Liability

BARKER v. LULL ENGINEERING COMPANY

(1978) 20 Cal. 3d 413

The Definition of Defect in Products Liability Design Cases

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May 24, 1978

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The Definition of Defect in Products Liability Design Cases

Summary

Under the Supreme Court Barker decision, a product design is "defective" either if:

(1) The product fails to meet consumer expectations; or (2) some feature of the product's design entails risks which are not justified by the feature's benefits. On this risk-benefit issue, once the plaintiff shows that the product's design proximately caused his injury, the entire burden of proof shifts to the defendant.

The Barker opinion intimates that in making its risk-benefit assessments the jury should consider new design alternatives which were not available at the time of the product's sale. The opinion also intimates that there is strict liability, without any proof of defect, for injuries caused by ultrahazardous products.

This memorandum concludes that Barker goes too far. Its recommendations are:

That the "consumer expectation" standard be either eliminated or replaced by a rule rendering a product's design presumptively defective if, without warning, it causes the product to perform less safely than other products of the same type.

That the risk-benefit standard be endorsed, but its peculiar and unworkable burden-of-proof feature be eliminated.

That design defect be measured as of the time of sale, at least insofar as technological developments are concerned.

That the idea of strict liability, without defect, for ultrahazardous products be negated.

Note: As background for this memorandum I have discussed Barker with about a dozen Los Angeles products liability lawyers on both sides of the plaintiffs/defendants fence. The recommendations are, of course, my own.

The Definition of Defect in Products Liability Design Cases

I. Background

A. "Automatic" Strict Liability

In Greenman v. Yuba Power Products, Inc. (59 Cal. 2d 21, 377 P.2d 897, 27 Cal. Rptr. 697, 1963), the California Supreme Court announced a doctrine of strict products liability. It is important to recognize what this strict liability rule is not. One can easily think of a strict liability rule which would render the manufacturer (or retailer) fully liable in tort for all injuries that are occasioned by the use of its product. (An analogy would be to workers' compensation, which imposes strict liability on the employer for all injuries "arising out of" the employment.) Under this definition of strict products liability, a knife manufacturer would be liable for all cuts caused by use of its knives, and an auto manufacturer would be automatically liable for all highway accidents produced by the operation of their vehicles. (This latter application of the strict liability rule would subordinate the existing rules imposing tort liability on negligent motorists, and it would effectively eliminate the need to talk about various auto no-fault programs.)

The doctrine of real strict liability which can be thus defined is one that is capable of being discussed in a coherent way. See Michelman, Pollution as a Tort: A Non-Accidental Perspective

or Calabresi's Costs, 80 Yale L. J. 647, 659-60 (1972). If, however, strict products liability were defined to entail automatic liability of this sort, it is possible that the law would wish to consider the measure of damages available in such a strict liability action; were liability as strict as this, it is arguable that damages should be limited to the victim's economic losses, and should not extend to intangible detriments like pain and suffering. Justice Traynor himself talks about such a liability/damages package in an important speech of his, published as a law review article in 1965. (Traynor, "The Ways and Meanings of Defective Products and Strict Liability," 32 Tenn. L. Rev. 363 (1965). The limitation on damages would, of course, be supported by the analogy to workers' compensation, where automatic liability results in compensation for economic losses only.

For better or worse, the rule of strict products liability, as nurtured by Justice Traynor in his 1944 Escola v. Coca Cola Bottling Co. concurring opinion[1/] and as eventually adopted in Greenman by the California Supreme Court, is not at all such a rule of automatic liability, for it is a vital requirement of strict liability that the product be flawed by the presence of a product "defect."

Mindful of this conspicuous "defect" requirement,[2/] one can usefully compare strict liability to the negligence and implied warranty doctrines which pre-existed strict liability, and which now coexist alongside of it. Negligence requires a demonstration of some deficiency in the manufacturer's conduct, while strict

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1/ 24 Cal. 2d 453, 150 P.2d 436 (1944).

2/ For the major role the "defect" concept plays in the federal auto safety program, see United States v. General Motors Corp., 565 F.2d 754 (D.C.Cir. 1977).

liability allows the plaintiff to show instead a deficiency in the manufacturer's product. In most cases, if the product is deficient, the manufacturer's conduct can be proven deficient as well, especially with the help of res ipsa loquitor. But this is not always true. The res ipsa argument, for example, may find an unsympathetic jury. (One defense counsel has told me that prior to Greenman he consistently won jury verdicts in negligence cases where the plaintiff chose to rely on res ipsa.) In any event, strict liability liberates the plaintiff from bearing any necessary burden of conducting an exploration, at trial, into the manufacturer's underlying conduct. For this reason strict liability is of considerable trial importance. As compared to negligence, therefore, strict liability "matters"--not overwhelmingly perhaps, but still quite significantly.

Liability under the implied warranty doctrine is essentially strict; and in implied warranty, as in strict products liability, the plaintiff can focus directly on the deficiency in the manufacturer's product. Under implied warranty, liability is established if the product is deemed not "merchantable"--i.e., not "fit for ordinary use." Theoretically, it is not clear that any major differences exist between the implied warranty concept of "non-fitness" and the strict liability concept of "defect." At the time of Greenman, only the retailer may have been subject to implied warranty liability; but in the years since Greenman, this liability has been extended to the manufacturer as well. For all this, however, there are still important limitations on the

warranty cause of action. Implied warranty law is designed to provide protection only to the retail buyer of the product and to certain others who stand in a close relationship with that buyer; therefore, many victims of product-related accidents--bystanders, for example--cannot avail themselves of the implied warranty doctrine. There are also a number of tricky prerequisites to an implied warranty claim, including the requirement that the victim give the seller prompt notice of the warranty violation. As Justice Traynor argued in Greenman, it is prerequisites of this sort (sensible enough in the ordinary commercial setting), that make implied warranty basically unsuitable as a primary theory in personal injury actions. Of course, the implied warranty doctrine still exists in California, as encased in the Uniform Commercial Code; and many complaints in personal injury products cases include an implied warranty count. But since juries get easily confused by the warranty concepts of "merchantability" and "fitness," plaintiffs' counsel generally delete their implied warranty counts prior to trial so as to encourage the jury to give its full attention to the strict liability count, and also the negligence count. (If plaintiffs think they can prove negligence, they will attempt to do so, even though technically speaking this is legally superfluous. The stronger the evidence is of the manufacturer's negligence, the more likely the jury is to rule for the plaintiff on the liability issue, and the more likely it is to give the plaintiff a larger damage award.)

II. The Meaning of Defect

A. Types of Defects

It is now generally understood that there are at least three types of defects: "production" defects (e.g., an exploding coke bottle), "design" defects (e.g., the already famous Ford Pinto), and "warning" defects. (The absence of a warning can be regarded as a certain kind of defect in design.) According to a recent federal study, in sample jurisdictions 37 percent of all products cases involve production defects; 39 percent, design defects; 21 percent, warning defects. The negligence doctrine of res ipsa loquitor has been available in production defect cases since Escola in 1944; and under post-Greenman strict liability, these cases raise few perplexing legal problems concerning the defect concept. (Production defect cases are often difficult, but the difficulties lie in proving the facts of one case.) "Warning" defect cases have also not been troublesome in California, at least so far.[1/] It is in design cases that the real confusion has arisen as to the meaning of "defect."

B. Patterns of Recovery

Whether for factual or legal reasons, pursuing a products claim is usually far from easy. Samples collected by the federal study indicate that of all products cases actually going to trial, the defense wins at least half. (Of course, the overwhelming majority of products claims are settled before trial. Therefore those cases that do go to trial are almost by hypothesis not representative.) In products cases (as in malpractice cases) a victim with less than $25,000 worth of legal injuries will find

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1/ But see Christofferson v. Kaiser Foundation Hospital, 15 Cal. App. 3d 75, 92 Cal. Rptr. 825 (1971)

it difficult to secure the services of a high quality lawyer; the lawyer's contingent fee award does not adequately remunerate him for the time he will need to spend in winning the case.

Products cases are in these ways quite different from automobile cases. In the latter, so long as the victim is willing to testify that the other motorist was driving too fast, the victim has a case that at least can go to the jury; insurers are thereby impelled to settle such small claims for what may be excessive sums. As a result, repeated studies have shown that auto victims with low levels of economic loss tend to be greatly "overcompensated," while auto victims with larger economic losses are severely "undercompensated." Information on the pattern of payouts in products claims is just beginning to come in. A recent ISO Closed Claims Survey does suggest that in product cases smaller claims are somewhat more fully compensated than large claims, but the sharp disparities that characterize auto claims appear to be absent in the products context.

C. Legal Development of the "Defect" Concept

1. Greenman had stated the strict liability test in terms of whether a product contained "a defect of which the plaintiff was not aware and which made [the product] unsafe for its intended use."

2. Stimulated by Greenman, the American Law Institute approved a section for its Torts Restatement--drafted by Dean Prosser--imposing strict liability on the seller of "any product in a defective condition unreasonably dangerous to the user or consumer." Comment i, explaining "unreasonably dangerous,"

states that "the article sold must be dangerous to an extent beyond that which would be contemplated by the reasonable consumer who purchased it, with the ordinary knowledge, common to the community and its conditions." Examples given are products that are not "unreasonably dangerous" sugar that harms a diabetic and butter that heightens a person's cholesterol level. As Reporter Prosser later explained, the "unreasonably dangerous" gloss prevents manufacturers from becoming "automatically responsible for all the harm that such things do in the world." (See Prosser, Strict Liability to the Consumer in California, 18 Hast. L. J. 9, 23 (1966).)

3. In Escola and Greenman, Justice Traynor had evidently regarded "defect" as a rather easy concept. However, by the time of his 1965 speech/law-review article, he was beginning to appreciate the uncertainties and perplexities of the "defect" concept. That article, however, perceived no necessary differences between the Greenman "defect" test and the Restatement test of "unreasonably dangerous defect." On the basis of a similar implicit perception, California opinions between 1962 and 1972 used the Greenman language and the Restatement language interchangeably.

4. In its 1972 decision in Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972), the California Supreme Court took two steps. First, it abandoned Justice Traynor's "intended use" test in favor of a test making liability possible whenever the product's use is "reasonably foreseeable", regardless of whether the use is unintended or improper.

Secondly, the Cronin Court decided that the basic standard of liability should be "defect" rather than "unreasonably dangerous defect." In the Court's view, "unreasonably dangerous" was partly superfluous, since the purpose of that language is to negate the idea of automatic liability, and since that purpose is fully achieved by "defect" standing alone. But "unreasonably dangerous" was also, the Court thought, nefarious. It "rings of negligence" and has a "negligence complexion." It is capable of being understood as subjecting the plaintiff to a two-step rather than a one-step burden of proof. And it would negate liability if "consumer expectations" had been in one way or another lowered--if, for example, the product's defect is "patent."

5. Cronin results. The Cronin opinion, while stripping "defect" of its "unreasonably dangerous" gloss, explicitly declined to provide "defect" with any other gloss, or to set forth any kind of working "defect" definition. Because of this, Cronin was generally scolded in the law reviews (see, e.g., Comment, 80 Dick. L. Rev. 663 [1976]), and was not followed in a number of other jurisdictions which otherwise had been happy enough to follow California's lead in products liability matters. See, e.g., Kirkland v. General Motors Corp., 521 P.2d 1153 [Okla. 1974]). In California, litigation in post-Cronin design cases was confused, as lawyers and judges struggled with the one-word "defect" standard. A few judges evidently felt that juries should be instructed in the language of "defect" and nothing more. A few other judges were uncertain about the admissibility of evidence

professing to show the practical or economic disadvantages of some "safer" design alternative that the plaintiff had identified. Among law professors, however, I think it is fair to say that the general understanding, even after Cronin, was that a design-defect plaintiff needed to show the existence of some design alternative that would provide greater safety at acceptable or reasonable costs. The Court of Appeal opinions between Cronin and Barker were largely consistent with this view. See, e.g. Self v. General Motors Corp., 42 Cal. App. 3d 1, 132 Cal. Rptr. 605 (1974). (Evidently, however, the predominant post-Cronin trial practice somewhat departed from this understanding. See pages 20-21, below.)

6. Barker. All of this Cronin-engendered confusion provides the backdrop for the Supreme Court's recent decision in Barker v. Lull Engineering Co., 20 C.3d 413, 143 Cal. Rptr. 225 (1978). In Barker, an employee was injured when he jumped off a high-lift loader which the defendant had manufactured and then leased to the victim's employer. The injured employee was subbing for the loader's regular operator, who was absent from work. The employee, heeding the yells from other employees, had jumped off the loader when the loader itself began to tip over while being operated on a sharply sloping terrain. At trial, the Barker plaintiff made several arguments as to what defects could be charged against the loader. One was that the loader should have had a broader wheelbase so as to render it more stable. (The Court's opinion does not mention this defect argument, but Barker's counsel tells me that the argument was explicitly made.) The plaintiff further argued that, if the loader's instability

is taken as a given, the loader was lacking in necessary safety devices: either "outriggers" (mechanical arms extending out from the machine), or roll bars or seat belts capable of protecting the operator of the lift in the event of a rollover.

Although the trial in Barker was subsequent to Cronin (the Supreme Court's Barker opinion gets this chronology wrong), a confused trial judge gave the jury an "unreasonably dangerous" defect instruction. The jury (which has been described to me as strongly anti-plaintiff in its orientation) then came in with a verdict in favor of the defendant-manufacturer. The plaintiff appealed, and won a reversal in the Court of Appeal on grounds that the trial instruction had ignored Cronin. With new appellate counsel, the defendant secured a hearing in the Supreme Court, arguing that in complicated cases involving product design--and especially when the alleged design defect involves the omission of a safety device--the simple language of "defect" simply is not an adequate way of guiding juries; rather, in design-omission cases, the language of "unreasonably dangerous" is appropriate after all. The defendant thus contended for a selective return to the Restatement language. The plaintiff, and also the California Trial Lawyers Association entering the case as an amicus, urged the Court simply to reaffirm its earlier Cronin ruling.

Barker was argued in November 1976, and was not decided by the Supreme Court until January 1978, fourteen months later. In its Barker opinion, the Court first of all reaffirmed its Cronin holding that "unreasonably dangerous" is not part of the "defect"

definition. The Court, however, went on to agree with the defendant's more general position that the language of "defect," standing alone, was inadequate as the strict-liability instruction in design cases. For such design cases, the Court proceeded to formulate a new, "two-pronged" defect test. (Evidently, "production" defects are to be measured in terms of deviation-from-the-manufacturer's-usual-product. See the new BAJI instruction, BAJI 9.00.3.) The first prong is that a design is defective if "the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." The second prong is that the product is defective if the risk of danger inherent in the product's design is not outweighed by the benefits associated with that design. With respect to this "risk-benefit" prong, the Court, in a further step, shifted the burden of proof to the defendant in a rather dramatic way. Once the plaintiff proves that the "product's design proximately caused" the plaintiff's injury, the defendant can escape a "defect" finding only by proving to the jury's satisfaction that the benefits produced by that design outweigh its evident danger.

The Court seems correct in its conclusion that "defect" needs some elaboration in design cases. The Court may also be correct in its conclusion that "unreasonably dangerous" is not the needed form of elaboration. Moreover, the Court's risk-benefit prong is clearly an appropriate test for proving a design defect. What is problemmatical about the Barker opinion is its burden-of-proof holding accompanying the risk-benefit prong, and its alternative ruling concerning

"consumer expectations." Those two rulings will be critiqued below. The memorandum's conclusions will be that these rulings, while well intended, are not really adequate, and should be legislatively modified.

III. The Risk-Benefit Prong

As noted, the prong itself is clearly correct. Even given the terseness of Cronin, most law professors had assumed that in design cases the test of defect was whether the design element was cost-beneficial. Insofar as this issue was somewhat confused at the trial level subsequent to Cronin, the resolution of this confusion is fortunate; by clearly legitimizing the relevance of a "trade-off" analysis, Barker performs a welcome service.

What is greatly troublesome, however, is Barker's holding on burden of proof. Under that holding, once the plaintiff shows that the product's design was the proximate cause of his injury, the burden of proof shifts to the manufacturer to show that the design is risk-beneficial. This proposal was not advanced by any of the parties or amici in Barker, and has never been even mentioned (so far as I know) in the law reviews. The Barker Court thus ventured a rule without giving anyone a chance to comment on it. The Barker Court's concerns are legitimate, but its rule "goes too far"--to use that handy lawyer's phrase.

A. The Extent of the Problem.

First of all, it is a rule with an incredible potential application. As one plaintiff's lawyer has told me, the rule

seems "limitless." It is hard to conceive of any product-related injury in which the argument could not be made that the injury was in one way or another caused by something in the product's design.

1. Until now, the paradigm of a product that is dangerous but not defective is a knife that cuts. (See the Traynor essay, supra, at 367.) Yet under Barker, when a knife cuts its user, the burden clearly shifts to the defendant to prove that the knife design is non-defective, since clearly a design feature of the knife--i.e., its long, sharp blade--has been a cause of the injury.

2. By now it is clear that smoking cigarettes causes cancer. We may not be able to identify the particular design feature of a cigarette which is the causative elememt, but we do know that there is something in the design of a cigarette which is carcinogenic. Therefore, under Barker, in a cigarette cancer case the defendant can establish defect quite easily, and the burden of proof thus shifts to the cigarette manufacturer to prove that the design of the cigarette is not defective after all.

3. In a typical automobile accident, a shrewd lawyer can probably identify numerous features of the car's design that have, in some sense, contributed to the plaintiff's injuries. Consider a car being driven at 55 miles an hour when the driver sees an obstacle 240 feet ahead; unable to stop in time, the car hits the obstacle, and the motorist goes through the windshield, suffering serious injuries. These injuries seem "proximately caused" by the car's design inasmuch as the car was designed to operate at speeds as fast as 55 miles an hour, inasmuch as

the brakes were not capable of stopping the car within 240 feet, inasmuch as the car's windshield produced injuries on impact, and so on.

B. The Alternative Design.

In the alternative, Barker places an incredible burden on the concept of a "product design" that "proximately causes" an injury. Consider, for example, how a shrewd defense counsel would challenge the plaintiff's second-prong "proximate cause" argument in the automobile hypothetical case above. Is it (or isn't it) correct to say that the design of the car's engine, brakes, or windshield proximately caused the victim's injuries? If a car rolls over when its wheels are turned 30 degrees while the car is traveling at 100 miles per hour (cf. the facts of the Culpepper case described below), under Barker do we (or don't we) say that the "design" of the car has been a "proximate cause" of the injury? People fall off ladders all the time, and the fact that ladders are in some general sense unstable permits these falls to occur. Does it, or doesn't it, follow that in every case of a person falling off a ladder, the "design" of the ladder has "proximately caused" the fall? (Of course, this example is similar to the facts of Barker itself.)

C. Statement of the Rule.

One can paraphrase the Barker burden-of-proof rule in these terms: "Proof that the product's design proximately caused the victim's injury creates a rebuttable presumption that the design is defective in the risk-benefit sense." So paraphrased, the Barker rule sounds a little like res ipsa loquitor--a technique of proof which, thanks to Escola, has been routinely applied

in production defect cases argued under a negligence theory. In a typical case of this sort, res ipsa is indeed a "simple, understandable rule of circumstantial evidence." (The characterization is from Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944). I.e., if a properly handled coke bottle explodes, it is reasonable to assume that there has been some negligence on the bottler's part. The Barker rule, by contrast, is not simple, and it is not at all in line with common sense. As such, it will confuse not only judges and lawyers, but additionally the jury. Even now, I am told, both res ipsa and strict liability are somewhat risky theories to take to the jury, since the jury may get confused by res ipsa, and may find the notion of strict liability somewhat unfair. Since the Barker presumption rule is, if anything, counterintuitive, one would expect erratic results as the rule is fed to the jury, and perhaps even occasional jury nullification.

D. The Nub of the Problem.

The nub is this: One cannot talk meaningfully about a risk-benefit defect in a product design until and unless one has identified some design alternative (or some design omission) which can serve as the basis for a risk-benefit analysis. Yet under the Barker rule, the plaintiff is not required to identify any relevant design alternative (or design omission).

One canon within the burden-of-proof jurisprudence is that the burden should be placed on the party who has control of the relevant information; this is the canon on which the Barker

opinion relies. But another important canon is that the burden of proof should not be placed so as to require a party to prove a negative. The Barker rule violates this canon.

Now, in particular cases, this violation may turn out to be harmless. In Korli v. Ford Motor Co., 137 Cal. Rptr. 828 (1977), hearing granted--which was before the Supreme Court at the time it decided Barker--the rear door of a 1965 Lincoln Continental was "rear-hinged" rather than "front-hinged." Rear-hinging produces a certain risk (of the door flying open if opened slightly while the car is traveling), but it also provides a certain benefit (easy ingress and egress). Given what we all know about automobiles, there is a single, clear-cut design alternative (i.e., front-hinging) with which the car's rear-hinged design can be compared. Since the manufacturer has the possession of the relevant data, requiring it to prove that, all things considered, rear-hinging is "risk-beneficial" is at least understandable.

But Korli is an unusual case. When an automobile accident produces a gasoline-tank fire, (see the facts of the Self case, supra, under Barker the car manufacturer is evidently required to establish that there is no other location for the gas tank anywhere in the car that is preferable to the gas tank's actual location. In Barker itself, the plaintiff's injury was evidently "proximately caused" by the height and instability of the lift. Under the Barker rule, the defendant may be required to prove not only that there is no way to render the lift less stable, but also that no safety devices exist that are capable of minimizing injuries if the lift should happen to topple.

E. Discharging the Burden of Proof.

Arguably, the analysis undertaken immediately above is excessive. Perhaps the defendant often can easily discharge its burden of proof. In the knife case, for example, knife manufacturers perhaps can easily show, relying on little more than the jury's known experience, that a knife needs a long, sharp blade if it is to function as a knife. (But how about the possibility of some "cage"-like safety device for the knife that would minimize the otherwise inevitable risk?) What is the burden of the defendant in Barker itself? Does the Barker defendant satisfy its burden when it establishes that the narrow wheel base of the loader is itself risk-beneficial? If we conceive of the narrow base as the design feature of the product that proximately caused the injury, this might be true. (However, we know from the Barker opinion of the other possibilities of defect in the product's design--the absence of outriggers and seat belts. Under Barker, doesn't the defendant need to establish that installation of these safety devices would not have been risk-beneficial?) The sum of the back-and-forth argumentation above is that Barker creates a very messy issue as to what the defendant has to do to rebut the presumption of defect which the Barker rule generates.

F. The Effect of the Rule.

What I have been assuming hitherto is that the victim of a product-related accident will seek to rely on the Barker burden-of-proof rule. However, my consultations with plaintiffs' attorneys has made clear that in a typical product case, with good facts, the plaintiff will effectively waive his right to rely on

this feature of Barker. Barker allows the plaintiff, having shown merely that the product's design caused his injury, to close his case, and then wait for the defendant to explain to the jury why the design is appropriate after all; once the defense has introduced significant evidence on the desirability of the product's design, the plaintiff will then bring forward his own evidence concerning the undesirability of that design (in an effort to counter the defendant's presentation). But for a plaintiff to rely on this sequence may involve very poor trial strategy. The sequence puts the plaintiff on the defensive by allowing the manufacturer to get to the jury first with its explanation of the product's design, and why that design is a good one. If the plaintiff's facts are strong, the plaintiff has a clear tactical interest in getting the jury to consider his version of the design issue first, before the manufacturer gets a chance to tell the jury its side of the story. Wishing to convey to the jury the strength of his case, the plaintiff will want to come out "with all guns blazing"--i.e., with his strongest possible evidence as to the impropriety of the product design. With the help of expert witnesses, for example, the plaintiff will suggest that a particular protective device has been utilized "since the time of the Greeks."

Therefore, as sweeping as the Barker holding on burden of proof may be, it may create a right which many product plaintiffs will not seek to exercise. Indeed, the relevant question may be this: In what limited class of products cases will the plaintiff

choose to avail himself of the Barker rule? One plaintiff's counsel has suggested to me that Barker will be helpful when the facts on liability are reasonably good but when the plaintiff's injuries are relatively small. As noted, plaintiffs with injuries less than $25,000 find it difficult to hire high-quality lawyers to prosecute their cases. The suggestion is that under Barker a lawyer will be able to "low budget" such a case, and therefore will agree to handle small damage claims that he would otherwise turn down.

Perhaps this result would ensue, but I am inclined to doubt it. If the facts on liability are good, the lawyer, needing to win the case in order to earn his contingent fee, retains his incentive to make his strongest pitch to the jury; and that strongest pitch may well involve waiving his Barker rights.

Rather, the class of cases in which the Barker burden-of-proof rule seems most clearly important, in a practical sense, are those in which the victim has suffered horrible injuries, but in which the facts indicating any design defect are quite weak. Given the factual frailty of the plaintiff's claim, before Barker the plaintiff might well have succumbed to summary judgment or a directed verdict. Under Barker, however, once the burden of proof has been shifted by the plaintiff's limited showing, only in a few cases will the defendant be able to offer the kind of "unmistakeable" evidence that will rebut the defect presumption as a matter of law. In all other cases, the issue of defect will therefore go to the jury, weak as the pro-defect facts may be.

What are the implications of sending the issue to

the jury? Given the possibility of jury sympathy with a horribly injured plaintiff, in many cases the jury may cut corners on the evidence in order to grant the plaintiff a recovery. These cases are, by hypothesis, wrongly decided. But I am not sure that such results would predominate. Product defendants win at least half of all jury trials, and juries sometimes resist the strict liability doctrine, not understanding its logic or doubting its fairness. The Barker burden-of-proof rule is very poor in its natural logic, and it dramatizes the strict liability issue in a rather queer way. The Barker rule is therefore conducive to jury deliberations that are confused and erratic.

G. Recommendation

For all of these reasons, the Barker rule on burden of proof is wrong. One can therefore consider a return to what most law professors would have soon to be the pre-Barker rule: that the plaintiff must bear the burden of showing a cost-beneficial design alternative. However, reversion to this professorial understanding may concede too much. First, it gives no weight to the access-of-information canon to which the Barker opinion properly refers. Moreover, that understanding evidently does not accurately reflect what was essentially happening at the trial level between Cronin and Barker. The trial process seems to have worked as follows: the plaintiff introduced evidence establishing the existence of a design alternative which would have prevented the injury, and also evidence indicating that the design alternative was technologically feasible. At this point--in fact, if

not in law--the burden of proof effectively shifted to the defendant to introduce evidence showing that the adoption of the plaintiff's design proposal would be too costly, would unduly interfere with the product's performance, or would create additional safety hazards. The plaintiff would then seek to dispute or diminish the defendant's argument. With the evidence having been presented in this manner, the case would then go to the jury.

It is my recommendation that the Legislature modify the Barker rule by legalizing what I understand to be this post-Cronin, pre-Barker practice. I.e., a statute should be passed establishing that in design defect cases, the plaintiff can prove defect by identifying a technologically feasible design alternative (including any omitted safety device) that would have been successful in preventing the victim's accident;[1/] at this point, the burden of proof should shift to the defendant to verify that the plaintiff's design proposal is not risk-beneficial after all. (I have no recommendation as to which party should bear the ultimate "burden of persuasion": i.e., which party loses if the evidence is deemed by the jury to be exactly fifty-fifty. I do not know enough about the dynamics of jury decisionmaking to know what the importance is of technical rules on the burden of persuasion.) To counter any incentive this recommendation might give plaintiffs to identify design alternatives that are plainly inadvisable, it should be made clear that if the defendant's trade-off evidence is clearly persuasive and is not seriously contradicted by the plaintiff's evidence, then summary judgment or a directed verdict is in order (at least respecting the particular defect claim.)

1/ Under this proposal, the plaintiff needs a lawyer who is knowledgeable about products, in general or in particular. But even under Barker, a plaintiff with an unknowledgeable lawyer is in obvious trouble.

This recommendation seems consistent with the explanation of design defect recently set forth by the Fifth Circuit in in Mitchell v. Fruehauf Corp., 568 F.2d 1139 (5th Cir. 1978) (applying Texas law). The recommendation would be acceptable to defense counsel, even though it imposes on them a greater burden than that contemplated by what I have described as the professorial understanding. My suspicion is that plaintiff's counsel would not strongly oppose the recommendation. As indicated, it seems consistent with the pre-Barker practice, and many plaintiff's counsel do not contemplate relying on their full Barker rights. Moreover, certain plaintiff's counsel with whom I have spoken are unable to believe that Barker really means what it seems to say, and have suggested what the Barker Court really intended was very close to what is here recommended.

IV. Consumer Expectations

A. Introduction

On the consumer expectations issue, the Barker Court was correct on one initial matter: its disparagement of consumer expectations in Cronin is not inconsistent with the emphasis it places on consumer expectations in Barker. Cronin merely ruled that non-compliance with consumer expectations was not a necessary test of liability; that holding leaves open whether such non-compliance is a sufficient liability test. Cronin and Barker thus are not in syllogistical conflict. Still, one can wonder what the need is for a consumer-expectation test once a risk-benefit test has been strongly asserted.

B. "Expectations"

1. There can be easy cases under a consumer-expectation standard, e.g., a new car whose wheel is so badly designed that the wheel collapses during ordinary driving. But easy cases are by hypothesis easy, and they remain easy under virtually any imaginable strict liability standard. And even in such an easy case, the "consumer expectation" is in a way both negative and hypothetical: all one can really say is that if the consumer had pondered the matter, he would not have expected the wheel to collapse.

2. Assume a product does contain a danger that is genuinely "unexpected"--e.g., a sailboat so designed as to create a slight risk of electrocution while in ordinary use. In such a case, it is useful to ask how this unexpected design risk came about. There are two possible explanations.

a. The risk was created by a poor design decision. If this is so, then the "consumer-expectation" standard is hardly needed; the risk-benefit standard easily produces the right result.

b. The product is designed in a way that is untypical, but intelligent; the untypical design produces substantial benefits for the sailboat user (perhaps even of a safety nature) that adequately justify the product's slight risk. In such a case, the risk-benefit standard would not lead to liability. But for such a product, the manufacturer has a clear obligation to give the boat consumer a warning as to the unusual danger. The absence of a warning produces liability under pre-Barker products liability

rules. But if a warning has been given, then the purchaser's "expectations" have been shaped by that warning; since the purchaser's expectations have not been defeated, recovery is not allowable under a consumer expectation theory.

Either way, therefore, the consumer-expectation standard seemingly adds nothing of value to products liability design litigation.

3. Unless the consumer-expectation standard is construed narrowly (see below), it becomes a mess in any operational sense. Exactly what kind of trial testimony is legally relevant to the issue of consumer expectations? Can the testimony of a single consumer (called to the stand by the plaintiff) that such a product does not (or would not) meet his expectations suffice to take the plaintiff's case to the jury? The Barker opinion refers to an earlier Court of Appeal case, Culpepper v. Volkswagen of America, Inc., 33 Cal. App. 3d 510, 509 Cal. Rptr. 110 (1973), as one in which a design defect, in the consumer-expectation sense, was adequately proven by circumstantial evidence. In Culpepper, a VW bug rolled over when the driver turned the front wheel sharply (18 percent) while traveling at 55 miles per hour. This apparently was an inherent tendency of the VW bug. VW introduced evidence establishing that several American cars, including the Gremlin and the Pinto, would themselves turn over under exactly the same driving circumstances. The plaintiff called as a witness an engineering expert (by no means an "ordinary consumer") who testified that in the United States there is an "implied standard"

that a car should not roll over on a smooth surface. Simply on the basis of this evidence (although noting also that VW had not warned buyers of the Bug's roll-over tendencies), the Court affirmed a jury verdict for the plaintiff. Since most of us have heard many negative out-of-court assessments of the Bug's design, we are probably sympathetic to this result. Legally speaking, however, it is uncertain whether the overall evidence in Culpepper justified the result. But at least in Culpepper there was expert testimony concerning an "implied standard." Under Barker, if a car were to turn over when its wheels were turned 30 degrees at a speed of 100 miles an hours, could the case go to the jury if the plaintiff and a friend of his both testified that as car consumers they would not expect a car to turn over under these driving circumstances? Many plaintiff's lawyers evidently think so; one described the "consumer expectations" test as making products cases "a hell of a lot easier," and indicated that in almost every case it should now be possible for the plaintiff to get to the jury.

4. Assume a typical product case like Barker itself, involving a sophisticated product with a complicated design available for a wide range of foreseeable uses, many of them "improper." What can one say in such cases about the product user's "expectations" of the product?

a. A likely answer is that the consumer has no expectations at all that are relevant to the circumstances of a particular accident. In Heaton v. Ford Motor Co., 248 Or. 467, 435 P.2d 806

(1967), a truck driven at normal speed by the plaintiff tipped over after hitting a rock which was half a foot in diameter. The Oregon Supreme Court ruled that the truck's performance in tipping over did not justify a plaintiff's verdict under a "consumer expectations" theory.

> Where the performance failure occurs under conditions with which the average consumer has experience, the facts of the accident alone may constitute a sufficient basis for the consumer to decide whether the expectations of an ordinary consumer of the product were met. High speed collisions with large rocks are not so common, however, that the average person would know from personal experience what to expect under these circumstances. . . The jury would therefore be unequipped, either by general background or by facts supplied in the record, to decide whether this wheel failed to perform as safely as an ordinary consumer would have expected.

b. In the alternative, what the consumer "expects" may be nothing more than the product has been intelligently designed by the manufacturer in the light of foreseeable contingencies. But if so, then the "user-oriented" consumer-expectations standards has no independent vitality. It collapses into the "manufacturer-oriented" risk-benefit standard. This has been recognized by the Oregon Supreme Court in a recent decision. Phillips v. Kimwood Machine Co., 269 Or. 485, 525 P.2d 1033, 1033, 1037 (1974), followed in Brown v. Link Belt Corp., 565 F.2d 1107, 1111 (9th Cir. 1977).

> [T]he two standards are the same because the seller acting reasonably would be selling the same product which a reasonable consumer believes he is purchasing. That is to say, a manufacturer would be negligent in marketing a given product, considering its risk, would necessarily be marketing a product which fell below the reasonable expectations of consumers who purchase it. The foreseeable uses to which a product could be put would be the same in the minds of both the seller and buyer unless one of the parties was not acting reasonably.

c. Finally, in my view it is meaningful to say that the consumer ordinarily expects that the product's design will allow the product to perform about as well as other products of the same sort. Implied warranty law seems to validate such an expectation. If I have correctly framed this "expectation," it provides a way to understand the weight placed on the "implied standard" testimony in Culpepper.

C. "Consumer"

As Barker notes, the "consumer expectations" standard embodies the implied warranty heritage of products liability law. Under implied warranty, the "consumer" is of course the retail purchaser of the product; the whole point of the implied warranty doctrine is to make sure that the product the purchaser acquires is of the quality he reasonably assumes it to be. Under the Restatement, the "consumer" whose expectations are legally relevant is also the product purchaser, as the explicit language of § 402(A) makes clear. As elaborated by the Court since 1965, however, the rule of strict liability also allows suits by employees who suffer product-related injuries involving products purchased by their employers and by passengers and pedestrians injured in accidents in automobiles driven by car owners. Pure implied warranty law would allow none of these suits; the Restatement has a caveat about the bystander-pedestrian. (I should make clear that I approve of these post-1965 products liability results-although the availability of workers' compensation for the injured employee weakens the strict liability argument).

How does the Barker test work in cases of this sort? Given the Barker facts in conjunction with the Barker opinion, it appears that the Court regards the employee rather than the employer as the "consumer" for purposes of the Barker rule. Likewise, the Barker Court's approval, during its discussion of consumer expectations, of its earlier decision in Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969), suggests that Barker regards even the bystander (and a fortiori the passenger) as the legally relevant "consumers." Now, strict liability has been concerned with consumer expectations because it wishes to make sure that the product purchaser gets the full benefit of an "honest" sales transaction. See Twerski, "From Defect to Cause to Comparative Fault--Rethinking Some Product Liability Concepts", 60 Marq. L. Rev. 297, 314 (1977). When the consumer expectation idea is extended to employees, passengers, and pedestrians, it forfeits most of its rationale. Moreover, since the employee and the passenger have "chosen" to use the product only in a very limited way, and since the pedestrian is a complete stranger to the product, none of these persons have expectations for the product that can be identified in any meaningful fashion. (I agree with the argument plaintiffs make on the assumption of risk issue that given the nature of the employment situation, employees have no real choice but to work with the machines to which their employers assign them.)

Assume an employer who purchases a factory product without an optional safety device, or a person who in buying a car chooses an optional but sharp-edged front fender potentially dangerous to

pedestrians. Cf. Knippen v. Ford Motor Co., 546 F.2d 993, (D.C. Cir. 1976). We can fully agree that the employee and the pedestrian should have potential causes of action against the manufacturer under a risk-benefit standard. But to allow causes of action in such situations under a consumer expectations standard would be without meaning.

D. The Relevance of Warnings

In Cronin, the Court was aware that a consumers' expectations argument is eliminated if the product's danger is "patent." Likewise, the argument is eliminated if the consumer has been warned by the manufacturer of the product's danger. What if, after Barker, the purchaser, having received an entirely adequate warning from the manufacturer, turns the product over to an acquaintance without conveying the warning to that acquaintance (or, while using the product himself, injures a bystander without warning the bystander of the product's danger?)

Under Barker, it would seem that the unwarned victim would be entitled to sue under a consumer-expectations theory, since his expectations were not reduced by any warning succeeded. This would be a bad result. It is highly desirable that products liability impose an important obligation to warn. Warning cases are, however, somewhat slippery, since no matter what warning the manufacturer has given, the plaintiff can argue that it was not sufficiently explicit in its substance or not sufficiently effective in its style. Given the current state of warning law, the law should not profess to go further by way of imposing on the manufacturer the

difficult-to-define obligation that it somehow or other make effective efforts to warn persons other than the product's purchaser. In most cases, there is nothing realistic that the manufacturer can do. And the non-buyer's interests are in part protected by his cause of action against the product's purchaser for loaning him the product without conveying the warning.

E. Conclusion

The consumer expectation prong in Barker is inadequate. The Court's purpose in Barker was to dispel the confusion created by Cronin; it is highly ironic that Barker would endorse a standard that is conducive to equal confusion. I see two plausible options:

1. Eliminate the consumer-expectation prong altogether.

2. Adopt the following rule: A product's design is presumptively defective if the design, without warning to the purchaser, results in the product's performing at a level that is significantly inferior, for safety purposes, to the performance of other products of the same type. The defendant can rebut this presumption by showing that the product's design is risk-beneficial, pursuant to the second Barker prong.

Option 1 is plausible. Option 2 gives plaintiffs more than Option 1 but less than they are given by the existing first prong in Barker. I regard Option 2 as an intelligent rule. It starts with the first prong "consumer expectations" idea. But then, accepting the analysis above, it specifies that what consumers really "expect" is that the product meets the norm of other products and that the product has been intelligently designed.

The option relies on the other-product idea to lead to a presumption of defect, and on the intelligent-design idea to allow the rebuttal of this presumption.

Option 2 would require the identification, in litigation, of the relevant product "type." Thus the VW bug in Culpepper should probably be regarded as a "sub-compact automobile" rather than an "automobile" generally. I regard these problems as manageable. A few products may be so unique as to fall within no "type." They would therefore not be vulnerable under the proposed rule, although of course suit could still be brought under a risk-benefit theory.

I can imagine suggestions that the "without warning" proviso in Option 2 be deleted. But this proviso is compelled by the consumer-expectations rationale on which this option is based. If the proviso is excluded, the option would be deprived of that rationale. Possibly, however, some other rationale for the option could be articulated. For example, a safety performance that is below the norm set by other products of the same type might provide strong circumstantial evidence (though less than a presumption) that the product's design is not risk-beneficial. If this analysis is correct, then Option 2 could possibly be derived from the risk-benefit rationale.

V. Post Sale Intervening Technology as an Assessment of Defectiveness.

There are two other issues raised by the Barker opinion, one by innuendo and one by a footnote. The first concerns the relevance of "state of the art" in products cases. The problem with "state of the art" is that the phrase itself is terribly ambiguous.

If it merely means the "custom" of manufacturers at a particular time, then it is clear that while a manufacturer's compliance with product custom may be some evidence of non-defect, it is not conclusive, since the custom itself may be unduly dangerous. (Even in negligence cases, with their greater emphasis on the reasonableness of the defendant's conduct, custom compliance is a relevant factor as to non-negligence, but it does not suffice to prove the defendant's case.)

In its stronger sense, however, "state of the art" refers to the full range of design options which were technologically available at the time of the product's sale by the manufacturer. What if a safety device is invented or developed between the time of the product's sale and the time of the plaintiff's injury (or of the plaintiff's lawsuit)? Can such post-sale intervening technology be relied on in assessing the defectiveness of the product's design? On these questions, a standard strict-liability locution collides with a standard strict-liability slogan. The standard locution is that the product must be "defective when sold." Given this locution, post-sale developments should not be legally relevant. The strict liability slogan is that strict liability does away with the "scienter" requirement (i.e., the requirement the manufacturer "knew or should have known" of the product's defect.) This slogan generally works well in production defect cases; but it does not necessarily follow that it states a correct principle in design cases. (The

slogan has not often been invoked in the California case law.) Given a broad understanding of the rejection of scienter, it becomes possible to conclude that intervening developments are entirely relevant after all.

The case law on this issue in other jurisdictions is muddled, and there are no cases in California that are really in point. (Ault v. International Harvester Co., 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974), allowed the admission of evidence in a strict liability action of a manufacturer's post-accident change in its product design; but there is no reason to believe that the revised design in Ault--malleable iron replacing aluminum in a motor vehicle gearbox--was in any way unavailable at all relevant earlier dates.) The Barker opinion contains language which can be read as deciding the intervening technology issue. At two important junctures, the Barker opinion indicates that the jury's decision on the risk-benefit design issue should be made with "hindsight."[1/] Now this may merely mean that the jury's review of the product's design should be sober and reflective. But it also can easily be read as signifying that intervening technology can be relied on in establishing the defectiveness of the product's design.[2/] Of the lawyers I have

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1/ 143 Cal. Rptr. at 236, 239.

2/ Another meaning is possible. What if the danger in the product's design was easily correctible--but the product was a novel one, and the manufacturer neither knew, nor reasonably could have known, of that danger? Should the "unknowable risk" be taken into account in defect reasoning? According to the

spoken to, some have not noticed these "hindsight" allusions; others don't know what the allusions are intended to mean; others still are convinced that the ex post facto perspective has now been emphatically endorsed by the California Supreme Court.

If Barker does intend this result, then Barker is wrong, at least in my view. First of all, it seems unfair to manufacturers to have their products measured by a standard of technology that was literally unavailable at the time of their product's sale. Since a large number of products cases involve products that are at least 10 years old, both the number of cases in which this unfairness problem could arise, and the magnitude of the problem in those cases where it does arise, seem quite substantial. (Indeed, if we are at all worried about imposing excessive liability on the manufacturers of older products, then the adoption of a hindsight approach in design defect cases is clearly a bad idea.) As noted above, civil juries, on intuitive fairness grounds, are somewhat resistant to the strict liability doctrine. Instructing juries to give full weight to post-sale technology may aggravate this tendency.

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legal section of the recent federal study, courts have "uniformly" refused to take into account such unknowable risks. See Interagency Task Force on Product Liability, IV Legal Study 91 (1977). Academic commentators have tended to frown on these rulings. Perhaps the Barker "hindsight" language is intended to approve of strict liability in such cases of "unknowable" risks. The intervening knowledge-of-risk issue I regard as quite difficult--more difficult than the intervening technology issue--and I include no recommendation here.

Secondly, while it is said that one purpose of strict liability is to encourage the development of safety technology, it is quite doubtful that a "hindsight rule" will achieve this objective. Indeed, such a rule might well operate as a drag upon the development of safety technology. Consider the product manufacturer which is thinking about expending for research into possible new safety devices. Under a hindsight rule, that manufacturer knows that if its expenditure is successful, the new technology it develops can be used as evidence against it in later products liability cases concerning products sold at an earlier date. The Ault court, in considering the so-called "repair" rule, was able to conclude that its negating of the rule would not delay safety changes, since the disincentive unquestionably created by allowing the admissibility of repair evidence is effectively offset by the manufacturer's strong incentive to "repair" its product promptly so as to minimize its liability exposure in the future. By contrast, in the context of the development of genuinely new technology, I am unable to identify any similar offsetting incentive which would counter the clear disincentive entailed by a "hindsight rule."

VI. Defectless Strict Liability for Ultrahazardous Product.

The second special issue in Barker arises from footnote 10. In that footnote the Court indicates that "in the instant case we have no occasion to determine whether a product which entails a substantial risk of harm may be found defective even if no safer alternative design is feasible. As we noted in Jiminez v. Sears, Roebuck & Co., 4 Cal. 3d 379, 383, 93 Cal. Rptr. 769, 482 P.2d 681,

684, Justice Traynor has suggested "that liability may be imposed as to products 'whose norm is danger.'"

This language suggests less a new definition of defect, and more the prospect of partially eliminating the defect requirement by imposing strict liability on what could be called "ultrahazardous products." The obvious analogy for a rule of strict liability for products "whose norm is danger" is the strict liability rule, adopted in California, for "ultrahazardous activities"--those activities that remain very hazardous even when "the utmost care is exercised." However, the analogy to the rule of strict liability for ultrahazardous activities breaks down. First of all, one can think of few, if any, products that contain an enormous danger even when "the utmost care is exercised." Secondly, even in an ultrahazardous activity suit, there is a complete defense if the plaintiff was a participant in, and therefore a direct beneficiary of, the activity. (Without going into great detail, I will simply say that I regard the defense as entirely sound.) Thus, while in some states (not including California) aviation is considered ultrahazardous, it is not the airplane passengers who are allowed to rely on the strict liability rule--but only those who suffer ground damage when a plane crashes. The user of a product is the counterpart of a participant in an activity. Given therefore, the ultrahazardous activity precedent, even if there were strict liability for ultrahazardous products the theory should not be available to the product's consumer or user. Perhaps a bystander could be

allowed to sue--but it is hard to conceive of a product that imposes an utmost-care "ultrahazard" upon a bystander.

The proposal quoted in footnote 10 is not really fleshed out by the footnote's references. The Jiminez opinion no more than mentions the idea of strict liability for products whose "norm is danger," and gives no examples of what such a product may be. In the Traynor defect essay to which both Barker and Jiminez refer, the chief example set forth is that of hepatitis-infected blood. And this example does not even fit the "norm of danger" description. Only a small number of blood samples are infected with hepatitis. And the defect in question is not one of design: it is rather a production defect, albeit a defect that may happen to be unpreventable, at least in part and at least for the time being. (By statute, there is no strict liability for hepatitis-infected blood in California. Health & Safety Code § 1606.)

Lawyers to whom I have spoken have little idea as to the possible meaning or coverage of footnote 10. Are cigarettes a product whose "norm is danger"? automobiles? certain industrial solvents that employees are expected to use? None of the briefs in Barker asserted the position of strict liability for inherently dangerous products. Therefore footnote 10 is not a response to any party's argument; rather, it is deliberate action on the part of the Court, inviting counsel to assert a particular argument in later cases. I see little merit in the notion of strict liability for ultrahazardous products--especially if full

common-law damages are available in such an action (see the discussion in IA above). Since the Court's calculated reference to a defectless strict liability is likely to unnerve rational insurance companies as they promulgate their rates, I would support legislative action negating the possibility of defectless strict liability for ultrahazardous products.

M O R E T O C O M E

MORE TO COME

One of the items we thought might be helpful as an understanding tool and valuable in its right is a history of tort law in California, 1850-1900. Professor Gary Schwartz is preparing such a paper. Included within this report is a brief discussion of the project by Professor Schwartz.

The Joint Committee on Tort Liability desires to send a questionnaire concerning the judicial administration of tort law to each California superior court judge. The questionnaire will cover: lawyers; juries; damages; the law; judges, and procedure, all as viewed from the bench. The polling and tabulation will be only after contact with the Judicial Council.

78-724

Project - California Tort History 1850-1900

1. Background

I became interested in this project for three related reasons. The first is the Citizens Commission Report, which, in discussing tort-law history, jumped directly from a generalized discussion of Anglo-American tort law in the nineteenth century to a discussion of California tort law in the mid-twentieth century, without making any effort to determine whether California's nineteenth century tort law reflected the supposed Anglo-American pattern. A second spur to my project was two recent prizewinning books on American Legal History: Professor Friedman's History of American Law and Prof. Horowitz's Transformation of American Law 1780-1860. Both books argue that nineteenth century tort law included a strong bias in favor of industrial and entreprenurial injurors and against ordinary-person victims. I wanted to determine whether these tendencies were at work in California--whose law is referred to in neither the Friedman nor the Horowitz book. The final reason for my project arose from my interest in California tort law in the 1970's. What are the continuities (and discontinuities) between California's 1970's tort law and California's tort law of a century ago?

2. Methodology. My original methodology was simple, if time-consuming. I read and then re-read every tort case in the California reports decided between the opening of the court system upon statehood in 1850 and the end of the nineteenth

century. (During this period, the only reported decisions are those of the Supreme Court.) The second stage of the methodology is in a way more difficult; this is to sort out and classify all these cases under appropriate headings.

3. Expectations for Final Report

My final report is expected to deal at least with the following topics:

1. Composition of tort law caseload. What kinds of tort cases were typical during the nineteenth century? How many suits by employees against employers? How many medical malpractice suits? Suits concerned with defective products? Suits against charities and governments? Who were the classes of victims who were suing the railroads?

2. Tort law doctrine. What were the rules of tort law in the 1850-1900 period? Had negligence emerged as the standard of liability? Were there any "pockets" of strict liability? Was res ipsa loquitur available? What were the affirmative defenses: Compliance with custom? Contributory negligence? Assumptions of risk? No duty to trespassers or licensees?

3. Indications of Sympathy

Where did the Supreme Court's evident sympathies lie? What language is there in court opinions expressing sympathy for railroads?; for industry in general?; for farming?; for accident victims and their need for compensation?

4. Patterns of Decision-Making

Here, questions such as the following are relevant: How willing were courts to affirm jury verdicts favoring plaintiffs? How often did employees win in their suits against employers? How often did railroads win (and lose) in their extensive tort litigation?

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